

components or systems have little or no effect on their overall failure rates.

(g) When planning the maintenance of a component or system to protect the safety and operating capability of the equipment, a number of items must be considered in the reliability assessment process:

(1) The consequences of each type of functional failure;

(2) The visibility of a functional failure to the operating crew (evidence that a failure has occurred);

(3) The visibility of reduced resistance to failure (evidence that a failure is imminent);

(4) The age-reliability characteristics of each item;

(5) The economic tradeoff between the cost of scheduled maintenance and the benefits to be derived from it;

(6) A multiple failure, resulting from a sequence of independent failures, may have consequences that would not be caused by any one of the individual failures alone. These consequences are taken into account in the definition of the failure consequences for the first failure; and

(7) A default strategy governs decision making in the absence of full information or agreement. This strategy provides for conservative initial decisions, to be revised on the basis of information derived from operating experience.

(h) A successful reliability-based maintenance program must be dynamic. Any prior-to-service program is based on limited information. As such, the operating organization must be prepared to collect and respond to real data throughout the operating life of the equipment. Management of the ongoing maintenance program requires an organized information system for surveillance and analysis of the performance of each item under actual operating conditions. This information is needed to determine the refinements and modifications to be made in the initial maintenance program (including the adjustment of task intervals) and to determine the need for product improvement. The information derived from operating experience may be considered to have the following hierarchy of importance in the reliability-based maintenance program:

(1) Failures that could affect operating safety;

(2) Failures that have operational consequences;

(3) The failure modes of units removed as a result of failures;

(4) The general condition of unfailed parts in units that have failed; and

(5) The general condition of serviceable units inspected as samples.

(i) At the time an initial maintenance program is developed, information is usually available to determine the tasks necessary to protect safety and operating capability. However, the information required to deter-

mine optimum task intervals and the applicability of age or life limits can be obtained only from age or life exploration after the equipment enters service. With any new equipment there is always the possibility of unanticipated failure modes. The first occurrence of any serious unanticipated failure should immediately set into motion the following improvement cycle:

(1) An inspection task is developed to prevent recurrences while the item is being redesigned;

(2) The operating fleet is modified to incorporate the redesigned part; and

(3) After the modification has proved successful, the special inspection task is eliminated from the maintenance program.

(j) Component improvements based on identification of the actual reliability characteristics of each item through age or life exploration, is part of the normal development cycle of all complex equipment.

## **PART 239—PASSENGER TRAIN EMERGENCY PREPAREDNESS**

### **Subpart A—General**

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#### **APPENDIX A TO PART 239—SCHEDULE OF CIVIL PENALTIES**

AUTHORITY: 49 U.S.C. 20102–20103, 20105–20114, 20133, 21301, 21304, and 21311; 49 U.S.C. 20133; 28 U.S.C. 2461 note; and 49 CFR 1.49(c), (g), (m).

SOURCE: 63 FR 24676, May 4, 1998, unless otherwise noted.

## Subpart A—General

### § 239.1 Purpose and scope.

(a) The purpose of this part is to reduce the magnitude and severity of casualties in railroad operations by ensuring that railroads involved in passenger train operations can effectively and efficiently manage passenger train emergencies.

(b) This part prescribes minimum Federal safety standards for the preparation, adoption, and implementation of emergency preparedness plans by railroads connected with the operation of passenger trains, and requires each affected railroad to instruct its employees on the provisions of its plan. This part does not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

### § 239.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all:

(1) Railroads that operate intercity or commuter passenger train service on standard gage track which is part of the general railroad system of transportation;

(2) Railroads that provide commuter or other short-haul rail passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(1)), including public authorities operating passenger train service; and

(3) Passenger or freight railroads hosting the operation of passenger

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$22,000 for any violation where circumstances warrant. See 49 U.S.C. 21301, 21304, and 49 CFR part 209, appendix A. Further designations, not found in the CFR citation for certain provisions are FRA Office of Chief Counsel computer codes added as a suffix to the CFR citation and used to expedite imposition of civil penalties for violations. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined designation cited in the penalty demand letter.

train service described in paragraph (a)(1) or (a)(2) of this section.

(b) This part does *not* apply to:

(1) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation;

(2) Operation of private cars, including business/office cars and circus trains; or

(3) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system.

### § 239.5 Preemptive effect.

Under 49 U.S.C. 20106 (formerly section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434)), issuance of this part preempts any State law, rule, regulation, order, or standard covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard, that is not incompatible with Federal law or regulation and does not unreasonably burden interstate commerce.

### § 239.7 Definitions.

As used in this part—

*Adjacent rail modes of transportation* means other railroads, trolleys, light rail, heavy transit, and other vehicles operating on rails or electromagnetic guideways which are expressly identified in a railroad's emergency preparedness plan.

*Administrator* means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

*Control center* means a central location on a railroad with responsibility for directing the safe movement of trains.

*Crewmember* means a person, other than a passenger, who is assigned to perform either:

(1) On-board functions connected with the movement of the train (i.e., an employee of a railroad, or of a contractor to a railroad, who is assigned to perform service subject to the Federal hours of service laws during a tour of duty) or

(2) On-board functions in a sleeping car or coach assigned to intercity service, other than food, beverage, or security service.

*Division headquarters* means the location designated by the railroad where a high-level operating manager (e.g., a superintendent, division manager, or equivalent), who has jurisdiction over a portion of the railroad, has an office.

*Emergency or emergency situation* means an unexpected event related to the operation of passenger train service involving a significant threat to the safety or health of one or more persons requiring immediate action, including:

- (1) A derailment;
- (2) A fatality at a grade crossing;
- (3) A passenger or employee fatality, or a serious illness or injury to one or more passengers or crewmembers requiring admission to a hospital;
- (4) An evacuation of a passenger train; and
- (5) A security situation (e.g., a bomb threat).

*Emergency preparedness plan* means one or more documents focusing on preparedness and response in dealing with a passenger train emergency.

*Emergency responder* means a member of a police or fire department, or other organization involved with public safety charged with providing or coordinating emergency services, who responds to a passenger train emergency.

*Emergency window* means that segment of a side facing glazing location which has been designed to permit rapid and easy removal in an emergency situation.

*FRA* means the Federal Railroad Administration.

*Joint operations* means rail operations conducted by more than one railroad on the same track, except as necessary for the purpose of interchange, regardless of whether such operations are the result of:

- (1) Contractual arrangements between the railroads;
- (2) Order of a governmental agency or a court of law; or
- (3) Any other legally binding directive.

*Passenger train service* means the transportation of persons (other than employees, contractors, or persons riding equipment to observe or monitor railroad operations) by railroad in intercity passenger service or commuter or other short-haul passenger

service in a metropolitan or suburban area.

*Person* includes all categories of entities covered under 1 U.S.C. 1, including, but not limited to, a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any passenger; any trespasser or nontrespasser; any independent contractor providing goods or services to a railroad; any volunteer providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

*Private car* means a rail passenger car used to transport non-revenue passengers on an occasional contractual basis, and includes business or office cars and circus trains.

*Qualified* means a status attained by an employee who has successfully completed any required training for, has demonstrated proficiency in, and has been authorized by the employer to perform the duties of a particular position or function involving emergency preparedness.

*Railroad* means:

(1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including—

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979, and

(ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads, but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation and

(2) A person that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.

*Railroad officer* means any supervisory employee of a railroad.

*System headquarters* means the location designated by the railroad as the general office for the railroad system.

**§ 239.9 Responsibility for compliance.**

Although the requirements of this part are stated in terms of the duty of a railroad, when any person, including a contractor to a railroad, performs any function required by this part, that person (whether or not a railroad) shall perform that function in accordance with this part.

**§ 239.11 Penalties.**

Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500 and not more than \$11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311 (formerly codified in 45 U.S.C. 438(e)). Appendix A contains a schedule of civil penalty amounts used in connection with this part.

**§ 239.13 Waivers.**

(a) Any person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for waiver must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

**§ 239.15 Information collection.**

(a) The information collection requirements of this part have been re-

viewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d) *et seq.*), and have been assigned OMB control number 2130-0545.

(b) The information collection requirements are found in the following sections: §§ 239.101, 239.103, 239.105, 239.107, 239.201, 239.203, 239.301, and 239.303.

**Subpart B—Specific Requirements****§ 239.101 Emergency preparedness plan.**

(a) Each railroad to which this part applies shall adopt and comply with a written emergency preparedness plan approved by FRA under the procedures of § 239.201. The plan shall include the following elements and procedures for implementing each plan element.

(1) *Communication.* (i) *Initial and on-board notification.* An on-board crewmember shall quickly and accurately assess the passenger train emergency situation and then notify the control center as soon as practicable by the quickest available means. As appropriate, an on-board crewmember shall inform the passengers about the nature of the emergency and indicate what corrective countermeasures are in progress.

(ii) *Notifications by control center.* The control center shall promptly notify outside emergency responders, adjacent rail modes of transportation, and appropriate railroad officials that a passenger train emergency has occurred. Each railroad shall designate an employee responsible for maintaining current emergency telephone numbers for use in making such notifications.

(2) *Employee training and qualification.*

(i) *On-board personnel.* The railroad's emergency preparedness plan shall address individual employee responsibilities and provide for initial training, as well as periodic training at least once every two calendar years thereafter, on the applicable plan provisions. As a minimum, the initial and periodic training shall include:

- (A) Rail equipment familiarization;
- (B) Situational awareness;
- (C) Passenger evacuation;
- (D) Coordination of functions; and

(E) “Hands-on” instruction concerning the location, function, and operation of on-board emergency equipment.

(ii) *Control center personnel.* The railroad’s emergency preparedness plan shall require initial training of responsible control center personnel, as well as periodic training at least once every two calendar years thereafter, on appropriate courses of action for each potential emergency situation. As a minimum, the initial and periodic training shall include:

(A) Dispatch territory familiarization; and

(B) Protocols governing internal communications between appropriate control center personnel whenever an imminent potential emergency situation exists.

(iii) *Initial training schedule for current employees.* The railroad’s emergency preparedness plan shall provide for the completion of initial training of all on-board and control center employees who are employed by the railroad on the date that the plan is conditionally approved under § 239.201(b)(1), in accordance with the following schedule:

(A) For each railroad that provides commuter or other short-haul passenger train service and whose operations include less than 150 route miles and less than 200 million passenger miles annually, not more than one year after January 29, 1999, or not more than 90 days after commencing passenger operations, whichever is later.

(B) For each railroad that provides commuter or other short-haul passenger train service and whose operations include at least 150 route miles or at least 200 million passenger miles annually, not more than two years after January 29, 1999, or not more than 180 days after commencing passenger operations, whichever is later.

(C) For each railroad that provides intercity passenger train service, regardless of the number of route miles or passenger miles, not more than two years after January 29, 1999, or not more than 180 days after commencing passenger operations, whichever is later.

(D) For each freight railroad that hosts passenger train service, regard-

less of the number of route miles or passenger miles of that service, not more than one year after January 29, 1999, or not more than 90 days after the hosting begins, whichever is later.

(iv) *Initial training schedule for new employees.* The railroad’s emergency preparedness plan shall provide for the completion of initial training of all on-board and control center employees who are hired by the railroad after the date on which the plan is conditionally approved under § 239.201(b)(1). Each employee shall receive initial training within 90 days after the employee’s initial date of service.

(v) *Testing of on-board and control center personnel.* A railroad shall have procedures for testing a person being evaluated for qualification under the emergency preparedness plan. The types of testing selected by the railroad shall be:

(A) Designed to accurately measure an individual employee’s knowledge of his or her responsibilities under the plan;

(B) Objective in nature;

(C) Administered in written form; and

(D) Conducted without reference by the person being tested to open reference books or other materials, except to the degree the person is being tested on his or her ability to use such reference books or materials.

(vi) *On-board staffing.* (A) Except as provided in paragraph (a)(2)(vi)(B), all crewmembers on board a passenger train shall be qualified to perform the functions for which they are responsible under the provisions of the applicable emergency preparedness plan.

(B) A freight train crew relieving an expired passenger train crew en route is not required to be qualified under the emergency preparedness plan, provided that at least one member of the expired passenger train crew remains on board and is available to perform excess service under the Federal hours of service laws in the event of an emergency.

(3) *Joint operations.* (i) Each railroad hosting passenger train service shall address its specific responsibilities consistent with this part.

(ii) In order to achieve an optimum level of emergency preparedness, each

railroad hosting passenger train service shall communicate with each railroad that provides or operates such service and coordinate applicable portions of the emergency preparedness plan. All of the railroads involved in hosting, providing, and operating a passenger train service operation shall jointly adopt one emergency preparedness plan that addresses each entity's specific responsibilities consistent with this part. Nothing in this paragraph shall restrict the ability of the railroads to provide for an appropriate assignment of responsibility for compliance with this part among those railroads through a joint operating agreement or other binding contract. However, the assignor shall not be relieved of responsibility for compliance with this part.

(4) *Special circumstances.* (i) *Tunnels.* When applicable, the railroad's emergency preparedness plan shall reflect readiness procedures designed to ensure passenger safety in an emergency situation occurring in a tunnel of 1,000 feet or more in length. The railroad's emergency preparedness plan shall address, as a minimum, availability of emergency lighting, access to emergency evacuation exits, benchwall readiness, ladders for detrainment, effective radio or other communication between on-board crewmembers and the control center, and options for assistance from other trains.

(ii) *Other operating considerations.* When applicable, the railroad's emergency preparedness plan shall address passenger train emergency procedures involving operations on elevated structures, including drawbridges, and in electrified territory.

(iii) *Parallel operations.* When applicable, the railroad's emergency preparedness plan shall require reasonable and prudent action to coordinate emergency efforts where adjacent rail modes of transportation run parallel to either the passenger railroad or the railroad hosting passenger operations.

(5) *Liaison with emergency responders.* Each railroad to which this part applies shall establish and maintain a working relationship with the on-line emergency responders by, as a minimum:

(i) Developing and making available a training program for all on-line emergency responders who could reasonably be expected to respond during an emergency situation. The training program shall include an emphasis on access to railroad equipment, location of railroad facilities, and communications interface, and provide information to emergency responders who may not have the opportunity to participate in an emergency simulation. Each affected railroad shall either offer the training directly or provide the program information and materials to state training institutes, firefighter organizations, or police academies;

(ii) Inviting emergency responders to participate in emergency simulations; and

(iii) Distributing applicable portions of its current emergency preparedness plan at least once every three years, or whenever the railroad materially changes its plan in a manner that could reasonably be expected to affect the railroad's interface with the on-line emergency responders, whichever occurs earlier, including documentation concerning the railroad's equipment and the physical characteristics of its line, necessary maps, and the position titles and telephone numbers of relevant railroad officers to contact.

(6) *On-board emergency equipment.* (i) *General.* Each railroad's emergency preparedness plan shall state the types of emergency equipment to be kept on board and indicate their location(s) on each passenger car that is in service. Effective May 4, 1999, or not more than 120 days after commencing passenger operations, whichever is later, this equipment shall include, at a minimum:

(A) One fire extinguisher per passenger car;

(B) One pry bar per passenger car; and

(C) One flashlight per on-board crewmember.

(ii) Effective May 4, 1999, or not more than 120 days after commencing passenger operations, whichever is later, each railroad that provides intercity passenger train service shall also equip each passenger train that is in service

## § 239.103

with at least one first-aid kit accessible to crewmembers that contains, at a minimum:

- (A) Two small gauze pads (at least 4x4 inches);
- (B) Two large gauze pads (at least 8x10 inches);
- (C) Two adhesive bandages;
- (D) Two triangular bandages;
- (E) One package of gauge roller bandage that is at least two inches wide;
- (F) Wound cleaning agent, such as sealed moistened towelettes;
- (G) One pair of scissors;
- (H) One set of tweezers;
- (I) One roll of adhesive tape;
- (J) Two pairs of latex gloves; and
- (K) One resuscitation mask.

(iii) *On-board emergency lighting.* Consistent with the requirements of part 238 of this chapter, auxiliary portable lighting (e.g., a handheld flashlight) must be accessible and provide, at a minimum:

(A) Brilliant illumination during the first 15 minutes after the onset of an emergency situation; and

(B) Continuous or intermittent illumination during the next 60 minutes after the onset of an emergency situation.

(iv) *Maintenance.* Each railroad's emergency preparedness plan shall provide for scheduled maintenance and replacement of first-aid kits, on-board emergency equipment, and on-board emergency lighting.

(7) *Passenger safety information.* (i) *General.* Each railroad's emergency preparedness plan shall provide for passenger awareness of emergency procedures, to enable passengers to respond properly during an emergency.

(ii) *Passenger awareness program activities.* Each railroad shall conspicuously and legibly post emergency instructions inside all passenger cars (e.g., on car bulkhead signs, seatback decals, or seat cards) and shall utilize one or more additional methods to provide safety awareness information including, but not limited to, one of the following:

- (A) On-board announcements;
- (B) Laminated wallet cards;
- (C) Ticket envelopes;
- (D) Timetables;
- (E) Station signs or video monitors;
- (F) Public service announcements; or

(G) Seat drops.

(b) [Reserved]

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### § 239.103 Passenger train emergency simulations.

(a) *General.* Each railroad operating passenger train service shall conduct full-scale emergency simulations, in order to determine its capability to execute the emergency preparedness plan under the variety of scenarios that could reasonably be expected to occur on its operation, and ensure coordination with all emergency responders who voluntarily agree to participate in the emergency simulations.

(b) *Frequency of the emergency simulations.* Except as provided in paragraph (c) of this section:

(1) Each railroad that provides commuter or other short-haul passenger train service and whose operations include less than 150 route miles and less than 200 million passenger miles annually, shall conduct a minimum of one full-scale emergency simulation during every two calendar years.

(2) Each railroad that provides commuter or other short-haul passenger train service and whose operations include at least 150 route miles or at least 200 million passenger miles annually, shall conduct a minimum of one full-scale emergency simulation during each calendar year.

(3) Each railroad that provides intercity passenger train service, shall conduct a minimum of one full-scale emergency simulation during each calendar year, regardless of the number of route miles or passenger miles.

(c) *Actual emergency situations.* Neither a tabletop exercise nor the activation of its emergency preparedness plan during an actual emergency situation may be credited toward the minimum number of full-scale emergency simulations required under paragraph (b) of this section. However, a railroad that has activated its emergency preparedness plan in response to a major emergency may elect to postpone a scheduled full-scale simulation for up to 180 calendar days beyond the applicable calendar year completion date in order to evaluate the effectiveness of its plan during that major emergency and, as appropriate, modify the rescheduled simulation.

(d) *Definition.* As used in this section, *major emergency* means an unexpected event related to the operation of passenger train service that results in serious injury or death to one or more persons and property damage greater than the current reporting threshold of part 225 of this chapter to railroad on-track equipment, signals, tracks, track structures, or roadbeds, including labor costs and the costs for acquiring new equipment and material.

#### § 239.105 Debriefing and critique.

(a) *General.* Except as provided in paragraph (b) of this section, each railroad operating passenger train service shall conduct a debriefing and critique session after each passenger train emergency situation or full-scale simulation to determine the effectiveness of its emergency preparedness plan, and shall improve or amend its plan, or both, as appropriate, in accordance with the information developed. The debriefing and critique session shall be conducted within 60 days of the date of the passenger train emergency situation or full-scale simulation.

(b) *Exceptions.* (1) No debriefing and critique session shall be required in the case of an emergency situation involving only a collision between passenger railroad rolling stock and: a pedestrian; a trespasser; or a motor vehicle or other highway conveyance at a highway-rail grade crossing, provided that the collision does not result in: a passenger or employee fatality, or an injury to one or more crewmembers or passengers requiring admission to a hospital; or the evacuation of a passenger train. (2) For purposes of this section, *highway-rail grade crossing* means a location where a public highway, road, street, or private roadway, including associated sidewalks and pathways, crosses one or more railroad tracks at grade, and *trespasser* means a person who is on that part of railroad property used in railroad operation and whose presence is prohibited, forbidden, or unlawful.

(c) *Purpose of debriefing and critique.* The debriefing and critique session shall be designed to determine, at a minimum:

(1) Whether the on-board communications equipment functioned properly;

(2) How much time elapsed between the occurrence of the emergency situation or full-scale simulation and notification to the emergency responders involved;

(3) Whether the control center promptly initiated the required notifications;

(4) How quickly and effectively the emergency responders responded after notification; and

(5) How efficiently the passengers exited from the car through the emergency exits.

(d) *Records.* (1) Each railroad shall maintain records of its debriefing and critique sessions at its system headquarters and applicable division headquarters for two calendar years after the end of the calendar year to which they relate, including the following information:

(i) Date and location of the passenger train emergency situation or full-scale simulation;

(ii) Date and location of the debriefing and critique session; and

(iii) Names of all participants in the debriefing and critique session.

(2) These records shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

#### § 239.107 Emergency exits.

For additional requirements related to emergency window exits, see part 223 of this chapter.

(a) *Marking.* Each railroad operating passenger train service shall determine for each passenger car that is in service, except for self-propelled cars designed to carry baggage, mail, or express:

(1) That all door exits intended for emergency egress are either lighted or conspicuously and legibly marked with luminescent material on the inside of the car and that clear and understandable instructions are posted at or near such exits.

(2) That all door exits intended for emergency access by emergency responders for extrication of passengers are marked with retroreflective material and that clear and understandable instructions are posted at each such door.



(b) *Inspection, maintenance, and repair.* Consistent with the requirements of part 223 of this chapter, each railroad operating passenger train service shall:

(1) Provide for scheduled inspection, maintenance, and repair of emergency window and door exits;

(2) Test a representative sample of emergency window exits on its cars at least once every 180 days to verify that they are operating properly; and

(3) Repair each inoperative emergency window and door exit on a car before returning the car to service.

(c) *Records.* Each railroad operating passenger service shall maintain records of its inspection, maintenance, and repair of emergency window and door exits at its system headquarters and applicable division headquarters for two calendar years after the end of the calendar year to which they relate. These records shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

(d) *Electronic recordkeeping.* Each railroad to which this part applies is authorized to retain by electronic recordkeeping the information prescribed in paragraph (b) of this section, provided that all of the following conditions are met:

(1) The railroad adequately limits and controls accessibility to such information retained in its database system and identifies those individuals who have such access;

(2) The railroad has a terminal at the system headquarters and at each division headquarters;

(3) Each such terminal has a desk-top computer (*i.e.*, monitor, central processing unit, and keyboard) and either a facsimile machine or a printer connected to the computer to retrieve and produce information in a usable format for immediate review by representatives of FRA and States participating under part 212 of this chapter;

(4) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as true and accurate copies of the electronically kept records; and

(5) The railroad provides representatives of FRA and States participating under part 212 of this chapter with immediate access to these records for inspection and copying during normal business hours and provides printouts of such records upon request.

### Subpart C—Review, Approval, and Retention of Emergency Preparedness Plans

#### § 239.201 Emergency preparedness plan; filing and approval.

(a) *Filing.* Each passenger railroad to which this part applies and all railroads hosting its passenger train service (if applicable) shall jointly adopt a single emergency preparedness plan for that service and the passenger railroad shall file one copy of that plan with the Associate Administrator for Safety, Federal Railroad Administration, Mail Stop 25, 400 Seventh Street, S.W., Washington, D.C. 20590, not more than 180 days after May 4, 1998, or not less than 45 days prior to commencing passenger operations, whichever is later. The emergency preparedness plan shall include the name, title, address, and telephone number of the primary person on each affected railroad to be contacted with regard to review of the plan, and shall include a summary of each railroad's analysis supporting each plan element and describing how every condition on the railroad's property that is likely to affect emergency response is addressed in the plan. Each subsequent amendment to a railroad's emergency preparedness plan shall be filed with FRA by the passenger railroad not less than 60 days prior to the proposed effective date.

(b) *Approval.* (1) *Preliminary review.* (i) Within 90 days of receipt of each proposed emergency preparedness plan, and within 45 days of receipt of each plan for passenger operations to be commenced after the initial deadline for plan submissions, FRA will conduct a preliminary review of the proposed plan to determine if the elements prescribed in § 239.101 are sufficiently addressed and discussed in the railroad's plan submission. FRA will then notify the primary contact person of each affected railroad in writing of the results of the review, whether the proposed

plan has been conditionally approved by FRA, and if not conditionally approved, the specific points in which the plan is deficient.

(ii) If a proposed emergency preparedness plan is not conditionally approved by FRA, the affected railroad or railroads shall amend the proposed plan to correct all deficiencies identified by FRA (and provide FRA with a corrected copy) not later than 30 days following receipt of FRA's written notice that the proposed plan was not conditionally approved.

(2) *Final review.* (i) Within 18 months of receipt of each proposed plan, and within 180 days of receipt of each proposed plan for passenger operations to be commenced after the initial deadline for plan submissions, FRA will conduct a comprehensive review of the conditionally approved plan to evaluate implementation of the elements included. This review will include ongoing dialogues with rail management and labor representatives, and field analysis and verification. FRA will then notify the primary contact person of each affected railroad in writing of the results of the review, whether the conditionally approved plan has been finally approved by FRA, and if not approved, the specific points in which the plan is deficient.

(ii) If an emergency preparedness plan of a railroad or railroads is not finally approved by FRA, the affected railroad or railroads shall amend the plan to correct all deficiencies (and provide FRA with a corrected copy) not later than 30 days following receipt of FRA's written notice that the plan was not finally approved.

(3) *Review of amendments.* (i) FRA will review each proposed plan amendment within 45 days of receipt. FRA will then notify the primary contact person of each affected railroad of the results of the review, whether the proposed amendment has been approved by FRA, and if not approved, the specific points in which the proposed amendment is deficient.

(ii) If the amendment is not approved, the railroad shall correct any deficiencies identified by FRA and file the corrected amendment prior to implementing the amendment.

(4) *Reopened review.* Following initial approval of a plan, or amendment, FRA may reopen consideration of the plan, or amendment, for cause stated.

#### **§ 239.203 Retention of emergency preparedness plan.**

Each passenger railroad to which this part applies, and all railroads hosting its passenger train service (if applicable), shall each retain one copy of the emergency preparedness plan required by § 239.201 and one copy of each subsequent amendment to that plan at the system and division headquarters of each, and shall make such records available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

### **Subpart D—Operational (Efficiency) Tests; Inspection of Records and Recordkeeping**

#### **§ 239.301 Operational (efficiency) tests.**

(a) Each railroad to which this part applies shall periodically conduct operational (efficiency) tests of its on-board and control center employees to determine the extent of compliance with its emergency preparedness plan.

(b) Each railroad to which this part applies shall maintain a written record of the date, time, place, and result of each operational (efficiency) test that was performed in accordance with paragraph (a) of this section. Each record shall also specify the name of the railroad officer who administered the test, the name of each employee tested, and sufficient information to identify the relevant facts relied on for evaluation purposes.

(c) Each record required by paragraph (a) of this section shall be retained at the system headquarters of the railroad and at the division headquarters for the division where the test was conducted for one calendar year after the end of the calendar year to which the test relates. Each such record shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

**§ 239.303 Electronic recordkeeping.**

Each railroad to which this part applies is authorized to retain by electronic recordkeeping the information prescribed in § 239.301, provided that all of the following conditions are met:

(a) The railroad adequately limits and controls accessibility to such information retained in its database system and identifies those individuals who have such access;

(b) The railroad has a terminal at the system headquarters and at each division headquarters;

(c) Each such terminal has a desk-top computer (*i.e.*, monitor, central processing unit, and keyboard) and either a facsimile machine or a printer con-

nected to the computer to retrieve and produce information in a usable format for immediate review by representatives of FRA and States participating under part 212 of this chapter;

(d) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as true and accurate copies of the electronically kept records; and

(e) The railroad provides representatives of FRA and States participating under part 212 of this chapter with immediate access to these records for inspection and copying during normal business hours and provides printouts of such records upon request.

APPENDIX A TO PART 239—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>

Section	Violation	Willful violation
Subpart B—Specific Requirements:		
239.101(a) Failure of a railroad to adopt a written emergency preparedness plan .....	\$7,500	\$11,000
(a)(1) Failure of the plan to provide for:		
(i) Initial or on-board notifications by an on-board crewmember .....	2,500	5,000
(ii) Notification of outside emergency responders by control center .....	2,500	5,000
(a)(2) Failure of the plan to provide for:		
(i) Initial or periodic training of on-board personnel .....	2,500	5,000
(ii) Initial or periodic training of control center personnel .....	2,500	5,000
(iii) Completion of initial training of all on-board and control center personnel by the specified date .....	2,500	5,000
(iv) Completion of initial training of all newly hired on-board and control center personnel by the specified date .....	2,500	5,000
(v) Adequate procedures to evaluate and test on-board and control center personnel for qualification under the emergency preparedness plan .....	2,500	5,000
(vi) Adequate on-board staffing .....	2,500	5,000
(a)(3) Failure of a host railroad involved in joint operations to coordinate applicable portions of the emergency preparedness plan with the railroad or railroads providing or operating a passenger train service operation .....	3,000	6,000
(a)(4) Failure of the plan to address:		
(i) Readiness procedures for emergencies in tunnels .....	2,500	5,000
(ii) Readiness procedures for emergencies on an elevated structure or in electrified territory .....	2,500	5,000
(iii) Coordination efforts involving adjacent rail modes of transportation .....	2,500	5,000
(a)(5) Failure of the plan to address relationships with on-line emergency responders by providing for:		
(i) The development and availability of training programs .....	3,000	6,000
(ii) Invitations to emergency responders to participate in emergency simulations .....	3,000	6,000
(iii) Distribution of applicable portions of the current emergency preparedness plan ....	3,000	6,000
(a)(6) Failure of the plan to provide for, or the railroad to include on board each train and maintain and replace:		
(i) Emergency equipment .....	2,500	5,000
(ii) First-aid kits .....	2,500	5,000
(iii) Emergency lighting .....	2,500	5,000
(a)(7) Failure of the plan to provide for emergency instructions inside each passenger car or to include additional safety awareness information .....	3,500	7,000
239.103 Failure to conduct a required full-scale simulation in accordance with the frequency schedule .....	5,000	7,500
239.105 Debriefing and critique		
(a) Failure to conduct a debriefing and critique session after an emergency or full-scale simulation .....	4,000	7,500
(d)(1) Failure to maintain a record .....	2,500	5,000
(i) Failure to include date or location of the emergency or simulation .....	1,000	2,000
(ii) Failure to include date or location of the debriefing and critique session .....	1,000	2,000
(iii) Failure to include names of participants in the debriefing and critique session .....	1,000	2,000
(d)(2) Failure to make record available .....	1,000	2,000
239.107 Emergency exits		

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Section	Violation	Willful violation
(a)(1), (a)(2):		
(i) Door not marked or instructions not posted .....	2,500	5,000
(ii) Door improperly marked or instructions 1,000-2,000-improperly posted .....	2,500	5,000
(b)(1) Failure to provide for scheduled inspection, maintenance, and repair of emergency windows and doors .....	5,000	7,500
(b)(2):		
(i) Failure to test a representative sample of emergency windows .....	3,000	6,000
(ii) Emergency windows tested too infrequently .....	1,500	3,000
(b)(3) Failure to repair an inoperative emergency window or door exit .....	3,500	7,000
(c):		
(i) Failure to maintain a record .....	2,500	5,000
(ii) Failure to make record available .....	1,000	2,000
(d)(1) Insufficient limits or controls on accessibility to records .....	2,500	5,000
(d)(2) Missing terminal .....	1,000	2,000
(d)(3) Inability of railroad to produce information in a usable format for immediate review .....	1,000	2,000
(d)(4) Failure by railroad to designate an authorized representative .....	1,000	2,000
(d)(5) Failure to make record available .....	1,000	2,000
Subpart C—Review, Approval, and Retention of Emergency Preparedness Plans:		
239.201 Filing and approval		
(a):		
(i) Failure of a railroad to file a written emergency preparedness plan .....	5,000	7,500
(ii) Failure to designate a primary person to contact for plan review .....	1,000	2,000
(iii) Failure of a railroad to file an amendment to its plan .....	2,500	5,000
(b)(1), (b)(2):		
(i) Failure of a railroad to correct a plan deficiency .....	2,500	5,000
(ii) Failure to provide FRA with a corrected copy of the plan .....	1,000	2,000
(b)(3):		
(i) Failure of a railroad to correct an amendment deficiency .....	2,500	5,000
(ii) Failure to file a corrected plan amendment with FRA .....	1,000	1,000
239.203 Retention of emergency preparedness plan		
(1) Failure to retain a copy of the plan or an amendment to the plan .....	2,500	5,000
(2) Failure to make record available .....	1,000	2,000
Subpart D—Operational (efficiency) tests; Inspection of Records and Recordkeeping:		
239.301 Operational (efficiency) tests		
(a) Testing Program .....	5,000	7,500
(b)(1) Failure to maintain a record .....	2,500	5,000
(b)(2) Record improperly completed .....	1,000	1,000
(c)(1) Failure to retain a copy of the record .....	2,500	5,000
(c)(2) Failure to make record available .....	1,000	2,000
239.303 Electronic recordkeeping		
(a) Insufficient limits or controls on accessibility to records .....	2,500	5,000
(b) Missing terminal .....	1,000	2,000
(c) Inability of railroad to produce information in a usable format for immediate review .....	1,000	2,000
(d) Failure by railroad to designate an authorized representative .....	1,000	2,000
(e) Failure to make record available .....	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$22,000 for any violation where circumstances warrant. See 49 U.S.C. 21301, 21304, and 49 CFR part 209, appendix A. Further designations, not found in the CFR citation for certain provisions, are FRA Office of Chief Counsel computer codes added as a suffix to the CFR citation and used to expedite imposition of civil penalties for violations. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined designation cited in the penalty demand letter.

**PART 240—QUALIFICATION AND CERTIFICATION OF LOCOMOTIVE ENGINEERS**

**Subpart A—General**

Sec.

- 240.1 Purpose and scope.
- 240.3 Application and responsibility for compliance.
- 240.5 Preemptive effect and construction.
- 240.7 Definitions.
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**Subpart B—Component Elements of the Certification Process**

- 240.101 Certification program required.
- 240.103 Approval of design of individual railroad programs by FRA.
- 240.104 Criteria for determining whether movement of roadway maintenance equipment or a dual purpose vehicle requires a certified locomotive engineer.
- 240.105 Criteria for selection of designated supervisors of locomotive engineers.
- 240.107 Criteria for designation of classes of service.
- 240.109 General criteria for eligibility based on prior safety conduct.

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- 240.111 Individual's duty to furnish data on prior safety conduct as motor vehicle operator.
- 240.113 Individual's duty to furnish data on prior safety conduct as an employee of a different railroad.
- 240.115 Criteria for consideration of prior safety conduct as a motor vehicle operator.
- 240.117 Criteria for consideration of operating rules compliance data.
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- 240.123 Criteria for initial and continuing education.
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### Subpart C—Implementation of the Certification Process

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### Subpart D—Administration of the Certification Programs

- 240.301 Replacement of certificates.
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### Subpart E—Dispute Resolution Procedures

- 240.401 Review board established.
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- 240.405 Processing qualification review petitions.
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#### APPENDIX A TO PART 240—SCHEDULE OF CIVIL PENALTIES

#### APPENDIX B TO PART 240—PROCEDURES FOR SUBMISSION AND APPROVAL OF LOCOMOTIVE ENGINEER QUALIFICATION PROGRAMS

#### APPENDIX C TO PART 240—PROCEDURES FOR OBTAINING AND EVALUATING MOTOR VEHICLE DRIVING RECORD DATA

#### APPENDIX D TO PART 240—IDENTIFICATION OF STATE AGENCIES THAT PERFORM NATIONAL DRIVER REGISTER CHECKS

#### APPENDIX E TO PART 240—RECOMMENDED PROCEDURES FOR CONDUCTING SKILL PERFORMANCE TESTS

#### APPENDIX F TO PART 240—MEDICAL STANDARDS GUIDELINES

AUTHORITY: 49 U.S.C. 20103, 20107, 20135, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

SOURCE: 56 FR 28254, June 19, 1991, unless otherwise noted.

### Subpart A—General

#### § 240.1 Purpose and scope.

(a) The purpose of this part is to ensure that only qualified persons operate a locomotive or train.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all locomotive engineers to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

(c) The qualifications for locomotive engineers prescribed in this part are pertinent to any person who operates a locomotive, unless that person is specifically excluded by a provision of this part, regardless of the fact that a person may have a job classification title other than that of locomotive engineer.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60988, Nov. 8, 1999]

**§ 240.3 Application and responsibility for compliance.**

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(c) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any function covered by this part must perform that function in accordance with this part.

[64 FR 60988, Nov. 8, 1999]

**§ 240.5 Preemptive effect and construction.**

(a) Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not impose an unreasonable burden on interstate commerce.

(b) FRA does not intend by issuance of these regulations to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury, or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

(c) FRA does not intend, by use of the term *locomotive engineer* in this part, to preempt or otherwise alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying persons authorized by a railroad to operate a locomotive.

(d) FRA does not intend by issuance of these regulations to preempt or otherwise alter the authority of a railroad

to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(e) Nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(f) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19002, Apr. 9, 1993; 64 FR 60988, Nov. 8, 1999]

**§ 240.7 Definitions.**

As used in this part—

*Administrator* means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

*Alcohol* means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

*Controlled Substance* has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301–1316).

*Current Employee* is any employee with at least one year of experience in transportation service on a railroad.

*Designated Supervisor of Locomotive Engineers* is a person designated as such by a railroad in accordance with the provisions of § 240.105 of this part.

*Drug* means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

*Dual purpose vehicle* means a piece of on-track equipment that is capable of moving railroad rolling stock and may

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also function as roadway maintenance equipment.

*EAP Counselor* means a person qualified by experience, education, or training to counsel people affected by substance abuse problems and to evaluate their progress in recovering from or controlling such problems. An EAP Counselor can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified physician designated by the railroad to perform functions in connection with alcohol or substance abuse evaluation or counseling. As used in this rule, the EAP Counselor owes a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of an employee.

*File, filed and filing* mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail on or after September 4, 2001, the date mailing was completed.

*FRA* means the Federal Railroad Administration.

*FRA Representative* means the Associate Administrator for Safety, FRA, and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified state railroad safety inspector acting under part 212 of this chapter.

*Instructor Engineer* means a person who

- (1) Is a qualified locomotive engineer under this part,
- (2) Has been selected by the railroad to teach others proper train handling procedures, and
- (3) Has demonstrated an adequate knowledge of the subjects under instruction.

*Joint Operations* means rail operations conducted by more than one railroad on the same track regardless of whether such operations are the result of—

- (1) Contractual arrangement between the railroads,
- (2) Order of a governmental agency or a court of law, or
- (3) Any other legally binding directive.

*Knowingly* means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

*Locomotive* means a piece of on-track equipment (other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2)):

- (1) With one or more propelling motors designed for moving other equipment;
- (2) With one or more propelling motors designed to carry freight or passenger traffic or both; or
- (3) Without propelling motors but with one or more control stands.

*Locomotive engineer* means any person who moves a locomotive or group of locomotives regardless of whether they are coupled to other rolling equipment except:

- (1) A person who moves a locomotive or group of locomotives within the confines of a locomotive repair or servicing area as provided for in 49 CFR 218.5(f) and 218.29(a)(1); or
- (2) A person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

*Main track* means a track upon which the operation of trains is governed by one or more of the following methods of operation: timetable; mandatory directive; signal indication; or any form of absolute or manual block system.

*Medical examiner* means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to the railroad to make an honest and fully informed evaluation of the condition of an employee.

*Newly hired employee* is any person who is hired with no prior railroad experience, or one with less than one

year of experience in transportation service on that railroad or another railroad.

*Person* means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

*Qualified* means a person who has passed all appropriate training and testing programs required by the railroad and this part and who, therefore, has actual knowledge or may reasonably be expected to have knowledge of the subject on which the person is qualified.

*Railroad* means any form of non-highway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

*Railroad Officer* means any supervisory employee of a railroad.

*Railroad rolling stock* is on-track equipment that is either a freight car (as defined in §215.5 of this chapter) or a passenger car (as defined in §238.5 of this chapter).

*Roadway maintenance equipment* is on-track equipment powered by any means of energy other than hand power which is used in conjunction with maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.

*Segment* means any portion of a railroad assigned to the supervision of one superintendent or equivalent transportation officer.

*Service* has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. See also the definition of "filing" in this section.

*Specialized roadway maintenance equipment* is roadway maintenance equipment that does not have the capability to move railroad rolling stock. Any alteration of such equipment that enables it to move railroad rolling stock will require that the equipment be treated as a dual purpose vehicle.

*Substance abuse disorder* refers to a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this part if the person (1) is currently using alcohol and other drugs, except under medical supervision consistent with the restrictions described in §219.103 of this chapter or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by an EAP Counselor.

*Type I Simulator* means a replica of the control compartment of a locomotive with all associated control equipment that:

(1) Functions in response to a person's manipulation and causes the gauges associated with such controls to appropriately respond to the consequences of that manipulation;

(2) Pictorially, audibly and graphically illustrates the route to be taken;

(3) Graphically, audibly, and physically illustrates the consequences of control manipulations in terms of their effect on train speed, braking capacity, and in-train force levels throughout the train; and

(4) Is computer enhanced so that it can be programmed for specific train consists and the known physical characteristics of the line illustrated.



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*Type II Simulator* means a replica of the control equipment for a locomotive that:

(1) Functions in response to a person's manipulation and causes the gauges associated with such controls to appropriately respond to the consequences of that manipulation;

(2) Pictorially, audibly, and graphically illustrates the route to be taken;

(3) Graphically and audibly illustrates the consequences of control manipulations in terms of their effect on train speed braking capacity, and in-train force levels throughout the train; and

(4) Is computer enhanced so that it can be programmed for specific train consists and the known physical characteristics of the line illustrated.

*Type III Simulator* means a replica of the control equipment for a locomotive that:

(1) Functions in response to a person's manipulation and causes the gauges associated with such controls to appropriately respond to the consequences of that manipulation;

(2) Graphically illustrates the route to be taken;

(3) Graphically illustrates the consequences of control manipulations in terms of their effect on train speed braking capacity, and in-train force levels throughout the train; and

(4) Is computer enhanced so that it can be programmed for specific train consists and the known physical characteristics of the line illustrated.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19002, Apr. 9, 1993; 60 FR 53136, Oct. 12, 1995; 64 FR 60989, Nov. 8, 1999; 65 FR 58483, Sept. 29, 2000; 67 FR 24, Jan. 2, 2002]

## § 240.9 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public

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interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60989, Nov. 8, 1999]

## § 240.11 Penalties and consequences for noncompliance.

(a) A person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500 and not more than \$11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

(d) In addition to the enforcement methods referred to in paragraphs (a), (b), and (c) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal Railroad Safety Act.

[56 FR 28254, June 19, 1991, as amended at 63 FR 11624, Mar. 10, 1998; 64 FR 60989, Nov. 8, 1999]

## § 240.13 Information collection requirements.

(a) The information collection requirements of this part were reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and are assigned OMB control number 2130–0533.

(b) The information collection requirements are found in the following sections: §§ 240.101, 240.103, 240.105, 240.107, 240.109, 240.111, 240.113, 240.115, 240.117, 240.119, 240.121, 240.123, 240.125, 240.127, 240.129, 240.201, 240.205, 240.207, 240.209, 240.211, 240.213, 240.215, 240.219, 240.221, 240.223, 240.227, 240.229, 240.301, 240.303, 240.305, 240.307, 240.309, 240.401, 240.403, 240.405, 240.407, 240.411.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19003, Apr. 9, 1993]

### Subpart B—Component Elements of the Certification Process

#### § 240.101 Certification program required.

(a) After September 17, 1991, each railroad in operation on that date and subject to this part shall have in effect a written program for certifying the qualifications of locomotive engineers.

(b) A railroad commencing operations after September 17, 1991, shall have such a program in effect prior to commencing operations.

(c) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad shall have a certification program approved in accordance with § 240.103 that includes:

(1) A procedure for designating any person it determines to be qualified as a supervisor of locomotive engineers that complies with the criteria established in § 240.105;

(2) A designation of the classes of service that it determines will be used in compliance with the criteria established in § 240.107;

(3) A procedure for evaluating prior safety conduct that complies with the criteria established in § 240.109;

(4) A procedure for evaluating visual and hearing acuity that complies with the criteria established in § 240.121;

(5) A procedure for training that complies with the criteria established in § 240.123;

(6) A procedure for knowledge testing that complies with the criteria established in § 240.125;

(7) A procedure for skill performance testing that complies with the criteria established in § 240.127; and

(8) A procedure for monitoring operational performance that complies

with the criteria established in § 240.129.

#### § 240.103 Approval of design of individual railroad programs by FRA.

(a) Each railroad shall submit its written certification program and a description of how its program conforms to the specific requirements of this part in accordance with the procedures contained in appendix B to this part and shall submit this written certification program for approval at least 60 days before commencing operations.

(b) That submission shall state the railroad's election either:

(1) To accept responsibility for the training of student engineers and thereby obtain authority for that railroad to initially certify a person as an engineer in an appropriate class of service, or

(2) To recertify only engineers previously certified by other railroads.

A railroad that elects to accept responsibility for the training of student engineers shall state in its submission whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by that railroad.

(c) A railroad's program is considered approved and may be implemented thirty days after the required filing date (or the actual filing date) unless the Administrator notifies the railroad in writing that the program does not conform to the criteria set forth in this part.

(1) If the Administrator determines that the program does not conform, the Administrator will inform the railroad of the specific deficiencies.

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received.

(d) A railroad shall resubmit its program within 30 days after the date of such notice of deficiencies. A failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this part.

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(1) The Administrator will inform the railroad in writing whether its revised program conforms with this part.

(2) If the program does not conform, the railroad shall resubmit its program.

(e) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this part at least 30 days prior to implementing such a change.

(1) A modification is material if it would affect the program's conformity with this part.

(2) The modification submission shall contain a description that conforms with the pertinent portion of the procedures contained in appendix B.

(3) The modification submission will be handled in accordance with the procedures of paragraphs (c) and (d) of this section as though it were a new program.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60990, Nov. 8, 1999]

#### **§ 240.104 Criteria for determining whether movement of roadway maintenance equipment or a dual purpose vehicle requires a certified locomotive engineer.**

(a) A railroad is not required to use a certified locomotive engineer to perform the following functions:

(1) Operate specialized roadway maintenance equipment; or

(2) Operate a dual purpose vehicle that is:

(i) Being operated in conjunction with roadway maintenance and related maintenance of way functions, including traveling to and from the work site;

(ii) Moving under authority of railroad operating rules designated for the movement of roadway maintenance equipment that ensure the protection of such equipment from train movements; and

(iii) Being operated by an individual trained and qualified in accordance with §§ 214.341, 214.343, and 214.355 of this chapter.

(b) A railroad is required to use a certified locomotive engineer when operating a dual purpose vehicle other than

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in accordance with paragraph (a)(2) of this section.

[64 FR 60990, Nov. 8, 1999]

#### **§ 240.105 Criteria for selection of designated supervisors of locomotive engineers.**

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) The railroad shall examine any person it is considering for qualification as a supervisor of locomotive engineers to determine that he or she:

(1) Knows and understands the requirements of this part;

(2) Can appropriately test and evaluate the knowledge and skills of locomotive engineers;

(3) Has the necessary supervisory experience to prescribe appropriate remedial action for any noted deficiencies in the training, knowledge or skills of a person seeking to obtain or retain certification; and

(4) Is a certified engineer who is qualified on the physical characteristics of the portion of the railroad on which that person will perform the duties of a Designated Supervisor of Locomotive Engineers.

(c) If a railroad does not have any Designated Supervisors of Locomotive Engineers, and wishes to hire one, the chief operating officer of the railroad shall make a determination in writing that the Designated Supervisor of Locomotive Engineers designate possesses the necessary performance skills in accordance with § 240.127. This determination shall take into account any special operating characteristics which are unique to that railroad.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60990, Nov. 8, 1999]

#### **§ 240.107 Criteria for designation of classes of service.**

(a) Each railroad's program shall state which of the three classes of service, provided for in paragraph (b) of this section, that it will cover.

(b) A railroad may issue certificates for any or all of the following classes of service:

(1) Train service engineers,

(2) Locomotive servicing engineers, and

(3) Student engineers.

(c) The following operational constraints apply to each class of service:

(1) Train service engineers may operate locomotives singly or in multiples and may move them with or without cars coupled to them;

(2) Locomotive servicing engineers may operate locomotives singly or in multiples but may not move them with cars coupled to them; and

(3) Student engineers may operate only under direct and immediate supervision of an instructor engineer.

(d) Each railroad is authorized to impose additional conditions or operational restrictions on the service an engineer may perform beyond those identified in this section provided those conditions or restrictions are not inconsistent with this part.

**§ 240.109 General criteria for eligibility based on prior safety conduct.**

(a) Each railroad's program shall include criteria and procedures to implement this section.

(b) A railroad shall evaluate the prior safety conduct of any person it is considering for qualification as a locomotive engineer and the program shall require that a person is ineligible if the person has an adverse record of prior safety conduct as provided for in § 240.115, § 240.117, or § 240.119.

(c) The program shall require evaluation of data which reflect the person's prior safety conduct as a railroad employee and the person's prior safety conduct as an operator of a motor vehicle, provided that there is relevant prior conduct. The information to be evaluated shall include:

(1) The relevant data furnished from the evaluating railroad's own records, if the person was previously an employee of that railroad;

(2) The relevant data furnished by any other railroad formerly employing the person; and

(3) The relevant data furnished by any governmental agency with pertinent motor vehicle driving records.

(d) The railroad's process for evaluating information concerning prior safety conduct shall be designed to conform wherever necessary with the procedural requirements of § 240.111, § 240.113, § 240.115, § 240.117, § 240.119, and § 240.217.

(e) When evaluating a person's motor vehicle driving record or a person's railroad employment record, a railroad shall not consider information concerning motor vehicle driving incidents or prior railroad safety conduct that

(1) Occurred prior to the effective date of this rule; or

(2) Occurred at a time other than that specifically provided for in § 240.115, § 240.117 or § 240.119 of this subpart.

(f) A railroad's program shall provide a candidate for certification or recertification a reasonable opportunity to review and comment in writing on any record which contains information concerning the person's prior safety conduct, including information pertinent to determinations required under § 240.119 of this subpart, if the railroad believes the record contains information that could be sufficient to render the person ineligible for certification under this subpart.

(g) The opportunity for comment shall be afforded to the person prior to the railroad's rendering its eligibility decision based on that information. Any responsive comment furnished shall be retained by the railroad in accordance with § 240.215 of this part.

(h) The program shall include a method for a person to advise the railroad that he or she has never been a railroad employee or obtained a license to drive a motor vehicle. Nothing in this section shall be construed as imposing a duty or requirement that a person have prior railroad employment experience or obtain a motor vehicle driver's license in order to become a certified locomotive engineer.

(i) Nothing in this section, § 240.111, or § 240.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad's obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 240.111 or § 240.113.

**§ 240.111 Individual's duty to furnish data on prior safety conduct as motor vehicle operator.**

(a) Except for initial certifications under paragraph (b), (h), or (i) of § 240.201 or for persons covered by

**§ 240.113**

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§ 240.109(h), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (b) through (f) or paragraph (g) of this section to make information concerning his or her driving record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning his or her driving record available to that railroad.

(b) Each person seeking certification or recertification under this part shall:

(1) Request, in writing, that the chief of each driver licensing agency identified in paragraph (c) of this section provide a copy of that agency's available information concerning his or her driving record to the railroad that is considering such certification or recertification; and

(2) Request, in accordance with the provisions of paragraph (d) or (e) of this section, that a check of the National Driver Register be performed to identify additional information concerning his or her driving record and that any resulting information be provided to that railroad.

(c) Each person shall request the information required under paragraph (b)(1) of this section from:

(1) The chief of the driver licensing agency which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other state or states that issued or reissued him or her a driver's license within the preceding five years.

(d) Each person shall request the information required under paragraph (b)(2) of this section from the Chief, National Driver Register, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590 in accordance with the procedures contained in appendix C unless the person's motor vehicle driving license was issued by one of the driver licensing agencies identified in appendix D.

(e) If the person's motor vehicle driving license was issued by one of the driver licensing agencies identified in appendix D, the person shall request the chief of that driver licensing agency to perform a check of the National Driver Register for the possible existence of additional information concerning his or her driving record and to provide the resulting information to the railroad.

(f) If advised by the railroad that a driver licensing agency or the National Highway Traffic Safety Administration has informed the railroad that additional information concerning that person's driving history may exist in the files of a state agency not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the state agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State or Federal law to obtain that additional information.

(g) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (b) of this section but shall notify the railroad of that fact in accordance with procedures of the railroad that comply with § 240.109(d).

(h) Each certified locomotive engineer or person seeking initial certification shall report motor vehicle incidents described in § 240.115 (b)(1) and (2) to the employing railroad within 48 hours of being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, such violations. For the purposes of engineer certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed state action to cancel, revoke, or deny a motor vehicle drivers license.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60990, Nov. 8, 1999]

**§ 240.113 Individual's duty to furnish data on prior safety conduct as an employee of a different railroad.**

(a) Except for initial certifications under paragraphs (b), (h), or (i) of

§ 240.201 or for persons covered by § 240.109(h), each person seeking certification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraph (b) of this section to make information concerning his or her prior railroad service record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning his or her service record available to that railroad.

(b) Each person seeking certification or recertification under this part shall request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record to the railroad that is considering such certification or recertification.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60990, Nov. 8, 1999]

**§ 240.115 Criteria for consideration of prior safety conduct as a motor vehicle operator.**

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred more than 36 months before the month in which the railroad is making its certification decision and shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance;

(2) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, refusal to undergo such testing as is required by State law when a law enforcement official seeks to determine

whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(c) If such an incident is identified,

(1) The railroad shall provide the data to the railroad's EAP Counselor, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder;

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the EAP Counselor in the context of such evaluation; and

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the EAP Counselor, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the EAP Counselor consistent with the technical standards specified in § 240.119(d)(3) of this part.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the person shall not be currently certified and the provisions of § 240.119(b) will apply.

**§ 240.117 Criteria for consideration of operating rules compliance data.**

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) A person who has demonstrated a failure to comply, as described in paragraph (e) of this section, with railroad rules and practices for the safe operation of trains shall not be currently certified as a locomotive engineer.

(c)(1) A certified engineer who has demonstrated a failure to comply, as described in paragraph (e) of this section, with railroad rules and practices for the safe operation of trains shall have his or her certification revoked.

(2) A Designated Supervisor of Locomotive Engineers, a certified locomotive engineer pilot or an instructor engineer who is monitoring, piloting or instructing a locomotive engineer and

fails to take appropriate action to prevent a violation of paragraph (e) of this section, shall have his or her certification revoked. Appropriate action does not mean that a supervisor, pilot or instructor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation. A Designated Supervisor of Locomotive Engineers will not be held culpable under this section when this monitoring event is conducted as part of the railroad's operational compliance tests as defined in §§ 217.9 and 240.303 of this chapter.

(3) A person who is a certified locomotive engineer but is called by a railroad to perform the duty of a train crew member other than that of locomotive engineer, and is performing such other duty, shall not have his or her certification revoked based on actions taken or not taken while performing that duty.

(d) Limitations on consideration of prior operating rule compliance data. Except as provided for in paragraph (i) of this section, in determining whether a person may be or remain certified as a locomotive engineer, a railroad shall consider as operating rule compliance data only conduct described in paragraphs (e)(1) through (e)(5) of this section that occurred within a period of 36 consecutive months prior to the determination. A review of an existing certification shall be initiated promptly upon the occurrence and documentation of any conduct described in this section.

(e) A railroad shall only consider violations of its operating rules and practices that involve:

(1) Failure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(2) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (*i.e.*, the clause that re-

quires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter (*i.e.*, employee injury/illness cases reportable exclusively because a physician or other licensed health care professional either made a one-time topical application of a prescription-strength medication to the employee's injury or made a written recommendation that the employee: Take one or more days away from work when the employee instead reports to work (or would have reported had he or she been scheduled) and takes no days away from work in connection with the injury or illness; work restricted duty for one or more days when the employee instead works unrestricted (or would have worked unrestricted had he or she been scheduled) and takes no other days of restricted work activity in connection with the injury or illness; or take over-the-counter medication at a dosage equal to or greater than the minimum prescription strength, whether or not the employee actually takes the medication, as instances of failure to adhere to this section);

(3) Failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class I, class 1A, class II, or running brake test provisions of 49 CFR part 238;

(4) Occupying main track or a segment of main track without proper authority or permission;

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (See 49 CFR part 218, subpart D and Appendix C to part 218);

(6) Incidents of noncompliance with § 219.101 of this chapter; however such

incidents shall be considered as a violation only for the purposes of paragraphs (g)(2) and (3) of this section;

(f)(1) If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.

(2) A violation of one or more operating rules or practices described in paragraph (e)(1) through (e)(5) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in paragraph (g) of this section.

(3) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under §217.9 of this chapter, will not be considered a legitimate test of operational skill or knowledge, and will not be considered for certification, recertification or revocation purposes.

(g) A period of ineligibility described in this paragraph shall:

(1) Begin, for a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(2) Begin, for a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(3) Be determined according to the following standards:

(i) In the case of a single incident involving violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(5) of this section, the person shall have his or her certificate revoked for a period of one month.

(ii) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(5) of this section, that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of six months.

(iii) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in paragraphs (e)(1) through (e)(6) of this section, that oc-

curred within 36 months of each other, the person shall have his or her certificate revoked for a period of one year.

(iv) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in paragraphs (e)(1) through (e)(6) of this section, that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of three years.

(v) Where, based on the occurrence of violations described in paragraph (e)(6) of this section, different periods of ineligibility may result under the provisions of this section and §240.119, the longest period of revocation shall control.

(4) Be reduced to the shorter periods of ineligibility imposed by paragraphs (g)(1) through (3) of this section as amended, and effective January 7, 2000 if the incident:

(i) Occurred prior to January 7, 2000; and

(ii) Involved violations described in paragraphs (e)(1) through (e)(5) of this section; and

(iii) Did not occur within 60 months of a prior violation as described in paragraph (e)(6) of this section.

(h) Future eligibility to hold certificate. A person whose certification has been denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (g)(3) of this section is for a period of one year or less;

(2) Certification was denied or revoked for reasons other than non-compliance with §219.101 of this chapter;

(3) The person has been evaluated by a Designated Supervisor of Locomotive Engineers and determined to have received adequate remedial training;

(4) The person has successfully completed any mandatory program of training or retraining, if that was determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (g)(3) of this section has elapsed.



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(i) In no event shall incidents that meet the criteria of paragraphs (i)(1) through (4) of this section be considered as prior incidents for the purposes of paragraph (g)(3) of this section even though such incidents could have been or were validly determined to be violations at the time they occurred. Incidents that shall not be considered under paragraph (g)(3) of this section are those that:

- (1) Occurred prior to May 10, 1993;
- (2) Involved violations of one or more of the following operating rules or practices:
  - (i) Failure to control a locomotive or train in accordance with a signal indication;
  - (ii) Failure to adhere to limitations concerning train speed;
  - (iii) Failure to adhere to procedures for the safe use of train or engine brakes; or
  - (iv) Entering track segment without proper authority;

(3) Were or could have been found to be violations under this section contained in the 49 CFR, parts 200 to 399, edition revised as of October 1, 1992; and

(4) Would not be a violation of paragraph (e) of this section.

(j) In no event shall incidents that meet the criteria of paragraphs (j)(1) through (2) of this section be considered as prior incidents for the purposes of paragraph (g)(3) of this section even though such incidents could have been or were validly determined to be violations at the time they occurred. Incidents that shall not be considered under paragraph (g)(3) of this section are those that:

- (1) Occurred prior to January 7, 2000;
- (2) Involved violations of one or more of the following operating rules or practices:
  - (i) Failure to control a locomotive or train in accordance with a signal indication that requires a complete stop before passing it;
  - (ii) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour or by more than one half of the authorized speed, whichever is less;

(3) Were or could have been found to be violations under this section contained in the 49 CFR, parts 200 to 399, edition revised as of October 1, 1999; and

(4) Would not be a violation of paragraph (e) of this section.

[64 FR 60990, Nov. 8, 1999, as amended at 68 FR 10139, Mar. 3, 2003]

### **§ 240.119 Criteria for consideration of data on substance abuse disorders and alcohol/drug rules compliance.**

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall not be currently certified as a locomotive engineer.

(2) Except as provided in paragraph (e) of this section, a certified engineer who is determined to have an active substance abuse disorder shall be suspended from certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (d) of this section.

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 240.115), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.403 of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to current ineligibility for certification.

(c) *Prior alcohol/drug conduct; Federal rule compliance.* (1) In determining whether a person may be or remain certified as a locomotive engineer, a railroad shall consider conduct described in paragraph (c)(2) of this section that occurred within a period of 60 consecutive months prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph.

(2) A railroad shall consider any violation of § 219.101 or § 219.102 of this chapter and any refusal or failure to provide a breath or body fluid sample for testing under the requirements of

part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this paragraph shall:

(i) Begin, for a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) Begin, for a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(4) The period of ineligibility described in this paragraph shall be determined in accordance with the following standards:

(i) In the case of a single violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (d) of this section. In the case of two violations of § 219.102, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of 9 months (unless identification of the violation was through a qualifying "co-worker report" as described in § 219.405 of this chapter and the engineer waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (d)). In the case of two or more violations of § 219.101, the person shall be ineligible to hold a certificate for a period of five years.

(iv) In the case of a refusal or failure to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative, the refusal or failure shall be treated for purposes of ineligibility under this paragraph in the same manner as a violation of—

(A) § 219.102, in the case of a refusal or failure to provide a urine specimen for testing; or

(B) § 219.101, in the case of a refusal or failure to provide a breath sample (subpart D), or a blood specimen for mandatory post-accident toxicological testing (subpart C)).

(d) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had certification suspended or revoked as a result of conduct described in paragraph (c) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has—

(i) Been evaluated by an EAP Counselor to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the EAP Counselor prior to return to service; and

(iii) Presented a urine sample for testing under Subpart H of this part that tested negative for controlled substances assayed and has tested negative for alcohol under paragraph (d)(4) of this section.

(2) An engineer placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the EAP Counselor and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than 60 months following return to service. Follow-up tests shall include not fewer than 6 alcohol tests and 6 drug tests during the first 12 months following return to service.

(3) Return-to-service and follow-up alcohol and drug tests shall be performed consistent with the requirements of subpart H of part 219 of this chapter.

(4) This paragraph does not create an entitlement to utilize the services of a railroad EAP Counselor, to be afforded leave from employment for counseling or treatment, or to employment as a

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locomotive engineer. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(e) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.403 of this chapter (“Voluntary Referral Policy”) to treat voluntary referrals for substance abuse counseling and treatment as confidential; and the certification status of an engineer who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its voluntary referral policy required to be issued pursuant to § 219.403 of this chapter a provision that, at least with respect to a certified locomotive engineer or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the EAP Counselor official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

[56 FR 28254, June 19, 1991, as amended at 60 FR 53136, Oct. 12, 1995; 62 FR 63467, Dec. 1, 1997]

### § 240.121 Criteria for vision and hearing acuity data.

(a) Each railroad’s program shall include criteria and procedures implementing this section.

(b) Fitness requirement. In order to be currently certified as a locomotive engineer, except as permitted by paragraph (e) of this section, a person’s vision and hearing shall meet or exceed the standards prescribed in this section and appendix F to this part. It is recommended that each test conducted pursuant to this section should be performed according to any directions supplied by the manufacturer of such test and any American National Standards Institute (ANSI) standards that are applicable.

(c) Except as provided in paragraph (e), each person shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing either

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in appendix F to this part.

(d) Except as provided in paragraph (e) of this section, each person shall have hearing acuity that meets or exceeds the following thresholds when tested by use of an audiometric device (calibrated to American National Standard Specification for Audiometers, S3.6-1969): the person does not have an average hearing loss in the better ear greater than 40 decibels at 500Hz, 1,000 Hz, and 2,000 Hz with or without use of a hearing aid.

(e) A person not meeting the thresholds in paragraphs (c) and (d) of this section shall, upon request, be subject to further medical evaluation by a railroad’s medical examiner to determine that person’s ability to safely operate a locomotive. In accordance with the guidance prescribed in appendix F to this part, a person is entitled to one retest without making any showing and to another retest if the person provides evidence substantiating that circumstances have changed since the last test to the extent that the person could now arguably operate a locomotive or train safely. The railroad shall provide its medical examiner with a copy of this part, including all appendices. If, after consultation with one of the railroad’s designated supervisors of locomotive engineers, the medical examiner concludes that, despite not meeting the threshold(s) in paragraphs (c) and (d) of this section, the person has the ability to safely operate a locomotive, the person may be certified as a locomotive engineer and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(f) As a condition of maintaining certification, each certified locomotive engineer shall notify his or her employing railroad's medical department or, if no such department exists, an appropriate railroad official if the person's best correctable vision or hearing has deteriorated to the extent that the person no longer meets one or more of the prescribed vision or hearing standards or requirements of this section. This notification is required prior to any subsequent operation of a locomotive or train which would require a certified locomotive engineer.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60992, Nov. 8, 1999]

**§ 240.123 Criteria for initial and continuing education.**

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) A railroad shall provide for the continuing education of certified locomotive engineers to ensure that each engineer maintains the necessary knowledge, skill and ability concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics as determined by a qualified Designated Supervisor of Locomotive Engineers), and relevant Federal safety rules.

(c) A railroad that elects to train a previously untrained person to be a locomotive engineer shall provide initial training which, at a minimum:

(1) Is composed of classroom, skill performance, and familiarization with physical characteristics components;

(2) Includes both knowledge and performance skill testing;

(3) Is conducted under the supervision of a qualified class instructor;

(4) Is subdivided into segments or periods of appropriate duration to effectively cover the following subject matter areas:

- (i) Personal safety,
- (ii) Railroad operating rules,
- (iii) Mechanical condition of equipment,
- (iv) Train handling procedures (including use of locomotive and train brake systems),

(v) Familiarization with physical characteristics including train handling, and

(vi) Compliance with Federal regulations;

(5) Is conducted so that the performance skill component shall

(i) Be under the supervision of a qualified instructor engineer located in the same control compartment whenever possible;

(ii) Place the student engineer at the controls of a locomotive for a significant portion of the time; and

(iii) Permit the student to experience whatever variety of types of trains are normally operated by the railroad.

(d) Pursuant to paragraphs (b) and (c) of this section, a person may acquire familiarity with the physical characteristics of a territory through the following methods if the specific conditions included in the description of each method are met. The methods used by a railroad for familiarizing its engineers with new territory while starting up a new railroad, starting operations over newly acquired rail lines, or reopening of a long unused route, shall be described in the railroad's locomotive engineer qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

(1) If ownership of a railroad is being transferred from one company to another, the engineer(s) of the acquiring company may receive familiarization training from the selling company prior to the acquiring railroad commencing operation; or

(2) Failing to obtain familiarization training from the previous owner, opening a new rail line, or reopening an unused route would require that the engineer(s) obtain familiarization through other methods. Acceptable methods of obtaining familiarization include using hyrail trips or initial lite locomotive trips in compliance with what is specified in the railroad's locomotive engineer qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60992, Nov. 8, 1999]

## § 240.125

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### § 240.125 Criteria for testing knowledge.

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) A railroad shall have procedures for testing a person being evaluated for qualification as a locomotive engineer in either train or locomotive service to determine that the person has sufficient knowledge of the railroad's rules and practices for the safe operation of trains.

(c) The testing methods selected by the railroad shall be:

(1) Designed to examine a person's knowledge of the railroad's rules and practices for the safe operation of trains;

(2) Objective in nature;

(3) Administered in written form;

(4) Cover the following subjects:

(i) Personal safety practices;

(ii) Operating practices;

(iii) Equipment inspection practices;

(iv) Train handling practices including familiarity with the physical characteristics of the territory; and

(v) Compliance with Federal safety rules;

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on his or her ability to use such reference books or materials.

(d) The conduct of the test shall be documented in writing and the documentation shall contain sufficient information to identify the relevant facts relied on for evaluation purposes.

### § 240.127 Criteria for examining skill performance.

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) A railroad shall have procedures for examining the performance skills of a person being evaluated for qualification as a locomotive engineer in either train or locomotive service to determine whether the person has the skills to safely operate locomotives and/or trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives or

trains, in the most demanding class or type of service that the person will be permitted to perform.

(c) The testing procedures selected by the railroad shall be:

(1) Designed to examine a person's skills in safely operating locomotives or trains including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains when performing the most demanding class or type of service that the person will be permitted to perform;

(2) Conducted by a Designated Supervisor of Locomotive Engineers, who does not need to be qualified on the physical characteristics of the territory over which the test will be conducted;

(3) Cover the following subjects during the test period

(i) Operating practices;

(ii) Equipment inspection practices;

(iii) Train handling practices; and

(iv) Compliance with Federal safety rules;

(4) Be of sufficient length to effectively evaluate the person's ability to operate trains; and

(5) Conducted when the person either

(i) Is at the controls of the type of train normally operated on that railroad or segment of railroad and which this person might be permitted or required by the railroad to operate in the normal course of events after certification or

(ii) Is at the controls of a Type I or Type II simulator programmed to replicate the responsive behavior of the type of train normally operated on that railroad or segment of railroad and which this person might be permitted or required by the railroad to operate in the normal course of events after certification.

(d) The conduct of the test shall be documented in writing by the designated supervisor and the documentation shall contain:

(1) The relevant facts concerning the train being operated;

(2) The constraints applicable to its operation; and

(3) The factors observed and relied on for evaluation purposes by the designated supervisor.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60992, Nov. 8, 1999]

**§ 240.129 Criteria for monitoring operational performance of certified engineers.**

(a) Each railroad's program shall include criteria and procedures for implementing this section.

(b) A railroad shall have procedures for monitoring the operational performance of those it has determined as qualified as a locomotive engineer in either train or locomotive service.

(c) The procedures shall:

(1) Be designed to determine that the person possesses and routinely employs the skills to safely operate locomotives and/or trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives and trains;

(2) Be designed so that each engineer shall be annually monitored by a Designated Supervisor of Locomotive Engineers, who does not need to be qualified on the physical characteristics of the territory over which the operational performance monitoring will be conducted;

(3) Be designed so that the locomotive engineer is either accompanied by the designated supervisor for a reasonable length of time or has his or her train handling activities electronically recorded by a train operations event recorder;

(d) The procedures may be designed so that the locomotive engineer being monitored either (i) is at the controls of the type of train normally operated on that railroad or segment of railroad and which this person might be permitted or required by the railroad to operate in the normal course of events after certification or (ii) is at the controls of a Type I or Type II simulator programmed to replicate the responsive behavior of the type of train normally operated on that railroad or segment of railroad and which this person might be permitted or required by the railroad to operate in the normal course of events after certification.

(e) The testing and examination procedures selected by the railroad for the

conduct of a monitoring program shall be:

(1) Designed so that each locomotive engineer shall be given at least one unannounced test each calendar year.

(2) Designed to test engineer compliance with provisions of the railroad's operating rules that require response to signals that display less than a "clear" aspect, if the railroad operates with a signal system that must comply with part 236 of this chapter;

(3) Designed to test engineer compliance with provisions of the railroad's operating rules, timetable or other mandatory directives that require affirmative response by the locomotive engineer to less favorable conditions than that which existed prior to initiation of the test;

(4) Designed to test engineer compliance with provisions of the railroad's operating rules, timetable or other mandatory directives violation of which by engineers were cited by the railroad as the cause of train accidents or train incidents in accident reports filed in compliance with part 225 of this chapter in the preceding calendar year;

(5) Designed so that the administration of these tests is effectively distributed throughout whatever portion of a 24-hour day that the railroad conducts its operations; and

(6) Designed so that individual tests are administered without prior notice to the engineer being tested.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60992, Nov. 8, 1999]

**Subpart C—Implementation of the Certification Process**

**§ 240.201 Schedule for implementation.**

(a) After October 30, 1991, each railroad in operation on that date shall designate in writing any person(s) it deems qualified as a designated supervisor of locomotive engineers. Each person so designated shall have demonstrated to the railroad through training, testing or prior experience that he or she has the knowledge, skills, and ability to be a designated supervisor of locomotive engineers.

(b) No later than November 1, 1991, each railroad shall designate in writing all persons that it will deem to be

## § 240.203

qualified as certified locomotive engineers for the purpose of initial compliance with paragraph (d) of this section, except as provided for in paragraph (h) of this section.

(1) Each person so designated shall have demonstrated to the railroad through training, testing or prior experience that he or she has the knowledge and skills to be a certified locomotive engineer.

(2) Each railroad shall issue, no later than December 31, 1991, a certificate that complies with § 240.223 to each person that it designates as qualified under the provisions of paragraph (b) of this section.

(c) No railroad shall permit or require a person, designated as qualified for certification under the provisions of paragraph (b) of this section, to perform service as a certified locomotive or train service engineer for more than the 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (e), (f) or (g) of this section unless that person has been determined to be qualified in accordance with procedures that comply with subpart C.

(d) After December 31, 1991, no railroad shall permit or require any person to operate a locomotive in any class of locomotive or train service unless that person has been certified as a qualified locomotive engineer and issued a certificate that complies with § 240.223.

(e) After December 31, 1991, no Class I railroad (including the National Railroad Passenger Corporation) or railroad providing commuter service shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in either locomotive or train service unless that person has been tested, evaluated, and determined to be qualified in accordance with procedures that comply with subpart C.

(f) After May 31, 1992 no Class II railroad shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in any class of locomotive or train service unless that

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person has been tested, evaluated and determined to be qualified in accordance with procedures that comply with subpart C.

(g) After November 30, 1992 no Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall designate any person it deems qualified as a designated supervisor of locomotive engineers or initially certify or recertify a person as a locomotive engineer in any class of locomotive or train service unless that person has been tested, evaluated and determined to be qualified in accordance with procedures that comply with subpart C.

(h) A railroad may continue to designate any person it deems qualified as a designated supervisor of locomotive engineers or as a certified engineer, on the basis of paragraph (b) determinations, prior to the pertinent date by which a railroad of its class must comply with the procedures for testing and evaluating persons required under subpart C. Each person designated as a locomotive engineer shall be issued a certificate that complies with § 240.223 prior to being required or permitted to operate a locomotive.

(i) A railroad commencing operations prior to the pertinent date for compliance by a railroad of its class may designate any person it deems qualified as a designated supervisor of locomotive engineers or as a certified locomotive engineer on the basis of paragraph (b) until the pertinent date for compliance with the procedures for testing and evaluating required under subpart C. Each person designated as a locomotive engineer shall be issued a certificate that complies with § 240.223 prior to being required or permitted to operate a locomotive.

### § 240.203 Determinations required as a prerequisite to certification.

(a) Except as provided in paragraph (c), after the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall, in accordance with its FRA-approved program determine in writing that:

(1) The individual meets the eligibility requirements of §§ 240.115, 240.117 and 240.119; and

(2) The individual meets the vision and hearing acuity standards of § 240.121;

(3) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 240.125;

(4) The individual has the necessary applied knowledge and operating performance skills, as demonstrated by successfully completing an operational performance test that meets the requirements of § 240.127; and

(5) Where a person has not previously been certified, that the person has completed a training program that meets the requirements of § 240.123.

(b) A railroad may certify a person as a student engineer after determining that the person meets the vision and hearing acuity standards of § 240.121. A railroad may subsequently certify that student engineer as either a locomotive servicing engineer or a train service engineer without further review of his or her acuity status provided it determines that:

(1) The person successfully completed a training program that complies with § 240.123;

(2) The person meets the eligibility requirements of §§ 240.109 and 240.119; and

(3) A period of not more than twenty-four months has elapsed since the student engineer certification was issued.

[56 FR 28254, June 19, 1991, as amended at 60 FR 53136, Oct. 12, 1995]

**§ 240.205 Procedures for determining eligibility based on prior safety conduct.**

(a) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall determine that the person meets the eligibility requirements of § 240.115 involving prior conduct as a motor vehicle operator, § 240.117 involving prior conduct as a railroad worker, and § 240.119 involving substance abuse disorders and alcohol/drug rules compliance.

(b) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file documents pertinent to the determinations referred to in paragraph (a) of this section, including a written document from its EAP Counselor either a document reflecting his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder and is ineligible for certification.

**§ 240.207 Procedures for making the determination on vision and hearing acuity.**

(a) After the pertinent date specified in paragraph (e), (f), or (g) of § 240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service, shall determine that the person meets the standards for visual acuity and hearing acuity prescribed in § 240.121.

(b) In order to make the determination required under paragraph (a), a railroad shall have on file either:

(1) A medical examiner's certificate that the individual has been medically examined and meets these acuity standards; or

(2) A written document from its medical examiner documenting his or her professional opinion that the person does not meet one or both acuity standards and stating the basis for his or her determination that

(i) The person can nevertheless be certified under certain conditions or

(ii) The person's acuity is such that he or she cannot safely operate a locomotive even with conditions attached.

(c) Any examination required for compliance with this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant such that:

(1) A licensed optometrist or a technician responsible to that person may perform the portion of the examination that pertains to visual acuity; and

(2) A licensed or certified audiologist or a technician responsible to that person may perform the portion of the examination that pertains to hearing acuity.



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(d) If the examination required under this section discloses that the person needs corrective lenses or a hearing aid, or both, either to meet the threshold acuity levels established in §240.121 or to meet a lower threshold determined by the railroad's medical examiner to be sufficient to safely operate a locomotive or train on that railroad, that fact shall be noted on the certificate issued in accordance with the provisions of this part.

(e) Any person with such a certificate notation shall use the relevant corrective device(s) while operating a locomotive in locomotive or train service unless the railroad's medical examiner subsequently determines in writing that the person can safely operate without using the device.

### **§ 240.209 Procedures for making the determination on knowledge.**

(a) After the pertinent date specified in paragraph (e), (f), or (g) of §240.201, each railroad, prior to initially certifying or recertifying any person as an engineer for any class of train or locomotive service, shall determine that the person has, in accordance with the requirements of §240.125 of this part, demonstrated sufficient knowledge of the railroad's rules and practices for the safe operation of trains.

(b) In order to make the determination required by paragraph (a) a railroad shall have written documentation showing that the person either

(i) Exhibited his or her knowledge by achieving a passing grade in testing that complies with this part or

(ii) Did not achieve a passing grade in such testing.

(c) If a person fails to achieve a passing score under the testing procedures required by this part no railroad shall permit or require that person to operate a locomotive as a locomotive or train service engineer prior to that person's achieving a passing score during a reexamination of his or her knowledge.

### **§ 240.211 Procedures for making the determination on performance skills.**

(a) After the pertinent date specified in paragraph (e), (f), or (g) of §240.201, each railroad, prior to initially certifying or recertifying any person as an

engineer for any class of train or locomotive service, shall determine that the person has demonstrated, in accordance with the requirements of §240.127 of this part, the skills to safely operate locomotives or locomotives and trains, including the proper application of the railroad's rules and practices for the safe operation of locomotives or trains, in the most demanding class or type of service that the person will be permitted to perform.

(b) In order to make this determination, a railroad shall have written documentation showing the person either

(i) Exhibited his or her knowledge by achieving a passing grade in testing that complies with this part or

(ii) Did not achieve a passing grade in such testing.

(c) If a person fails to achieve a passing score under the testing and evaluation procedures required by this part, no railroad shall permit or require that person to operate a locomotive as a locomotive or train service engineer prior to that person's achieving a passing score during a reexamination of his or her performance skills.

(d) No railroad shall permit a designated supervisor of locomotive engineers to test, examine or evaluate his or her own performance skills when complying with this section.

### **§ 240.213 Procedures for making the determination on completion of training program.**

(a) After the pertinent date specified in paragraph (e), (f), or (g) of §240.201, each railroad, prior to the initial issuance of a certificate to any person as a train or locomotive service engineer, shall determine that the person has, in accordance with the requirements of §240.123 of this part, the knowledge and skills to safely operate a locomotive or train in the most demanding class or type of service that the person will be permitted to perform.

(b) In making this determination, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with §240.123 of this part;

(2) The person demonstrated his or her knowledge and skills by achieving a passing grade under the testing and evaluation procedures of that training program; and

(3) A qualified Designated Supervisor of Locomotive Engineers has determined that the person is familiar with the physical characteristics of the railroad or its pertinent segments.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60992, Nov. 8, 1999]

**§ 240.215 Retaining information supporting determinations.**

(a) After the pertinent date in paragraphs (e), (f) or (g) of § 240.201, a railroad that issues, denies, or revokes a certificate after making the determinations required under § 240.203 shall maintain a record for each certified engineer or applicant for certification that contains the information the railroad relied on in making the determinations.

(b) The information concerning eligibility that the railroad shall retain includes:

(1) Any relevant data from the railroad's records concerning the person's prior safety conduct;

(2) Any relevant data furnished by another railroad;

(3) Any relevant data furnished by a governmental agency concerning the person's motor vehicle driving record; and

(4) Any relevant data furnished by the person seeking certification concerning his or her eligibility.

(c) The information concerning vision and hearing acuity that the railroad shall retain includes:

(1) The relevant test results data concerning acuity; and,

(2) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's acuity.

(d) The information concerning demonstrated knowledge that the railroad shall retain includes:

(1) Any relevant data from the railroad's records concerning the person's success or failure of the passage of knowledge test(s); and

(2) A sample copy of the written knowledge test or tests administered.

(e) The information concerning demonstrated performance skills that the railroad shall retain includes:

(1) The relevant data from the railroad's records concerning the person's success or failure on the performance skills test(s) that documents the relevant operating facts on which the evaluation is based including the observations and evaluation of the designated supervisor of locomotive engineers;

(2) If a railroad relies on the use of a locomotive operations simulator to conduct the performance skills testing required under this part, the relevant data from the railroad's records concerning the person's success or failure on the performance skills test(s) that documents the relevant operating facts on which the determination was based including the observations and evaluation of the designated supervisor of locomotive engineers; and;

(3) The relevant data from the railroad's records concerning the person's success or failure on tests the railroad performed to monitor the engineer's operating performance in accordance with § 240.129.

(f) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certified engineer that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and performance skills and relied on by the railroad in making its determinations.

(g) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certified engineer that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(h) All records required under this section shall be retained for a period of six years from the date of the certification, recertification, denial or revocation decision and shall be made available to FRA representatives upon request during normal business hours.

(i) It shall be unlawful for any railroad to knowingly or any individual to willfully:

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(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

(j) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad adequately limits and controls those who have access to such information;

(2) The railroad employs a system for data storage that permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(3) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19003, Apr. 9, 1993]

#### § 240.217 Time limitations for making determinations.

(a) After the pertinent date in paragraph (e), (f) or (g) of § 240.201, a railroad shall not certify or recertify a person as a qualified locomotive engineer in any class of train or engine service, if the railroad is making:

(1) A determination concerning eligibility and the eligibility data being relied on were furnished more than 366 days before the date of the railroad's certification decision;

(2) A determination concerning visual and hearing acuity and the medical examination being relied on was conducted more than 366 days before the date of the railroad's recertification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 366 days before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated performance skills and the

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performance skill testing being relied on was conducted more than 366 days before the date of the railroad's certification decision;

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with paragraph (c)(2) of this section, § 240.227, or § 240.229.

(c) Except as provided in § 240.201 concerning implementation dates for initial certification decisions and paragraph (b) of this section, no railroad shall:

(1) Certify a person as a qualified locomotive engineer for an interval of more than 36 months; or

(2) Rely on a certification issued by another railroad that is more than 36 months old.

(d) Except as provided for in § 240.201 concerning initial implementation of the program, a railroad shall issue each person designated as a certified locomotive engineer a certificate that complies with § 240.223 no later than 30 days from the date of its decision to certify or recertify that person.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19003, Apr. 9, 1993; 60 FR 53137, Oct. 12, 1995; 64 FR 60992, Nov. 8, 1999]

#### § 240.219 Denial of certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification.

(b) This section does not require further opportunity to comment if the railroad's denial is based solely on factors addressed by §§ 240.115, 240.117, and 240.119 and the opportunity to comment afforded by those sections has been provided.

(c) If it denies a person certification or recertification, a railroad shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The document explaining the basis for the denial shall be

mailed or delivered to the person within 10 days after the railroad's decision and shall give the date of the decision.

**§ 240.221 Identification of qualified persons.**

(a) After November 1, 1991, a railroad shall maintain a written record identifying each person designated by it as a supervisor of locomotive engineers.

(b) After November 1, 1991, a railroad shall maintain a written record identifying each person designated as a certified locomotive engineer. That listing of certified engineers shall indicate the class of service the railroad determines each person is qualified to perform and date of the railroad's certification decision.

(c) If a railroad is responsible for controlling joint operations territory, the listing shall include person(s) certified in accordance with § 240.229.

(d) The listing required by paragraphs (a), (b), and (c) shall be updated at least annually.

(e) The record required under this section shall be kept at the divisional or regional headquarters of the railroad and shall be available for inspection or copying by FRA during regular business hours.

(f) A railroad may obtain approval from FRA to maintain this record electronically or maintain this record at the railroad's general offices, or both. Requests for such approval shall be filed in writing with the Associate Administrator for Safety and contain sufficient information to explain how FRA will be given access to the data that is fully equivalent to that created by compliance with paragraph (e).

**§ 240.223 Criteria for the certificate.**

(a) As a minimum, each certificate issued in compliance with this part shall:

(1) Identify the railroad or parent company that is issuing it;

(2) Indicate that the railroad, acting in conformity with this part, has determined that the person to whom it is being issued has been determined to be qualified to operate a locomotive;

(3) Identify the person to whom it is being issued (including the person's name, date of birth and employee identification number, and either a phys-

ical description or photograph of the person);

(4) Identify any conditions or limitations, including the class of service or conditions to ameliorate vision or hearing acuity deficiencies, that restrict the person's operational authority;

(5) Show the date of its issuance;

(6) Be signed by a supervisor of locomotive engineers or other individual designated in accordance with paragraph (b) of this section;

(7) Show the date of the person's last operational monitoring event as required by § 240.129(c) and § 240.303(b), unless that information is reflected on supplementary documents which the locomotive engineer has in his or her possession when operating a locomotive; and

(8) Be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) Each railroad to which this part applies shall designate in writing any person, other than a supervisor of locomotive engineers, that it authorizes to sign the certificates described in this section. The designation can identify such persons by name or job title.

(c) Nothing in paragraph (a) of this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on that certificate; or

(2) Otherwise falsify that certificate through material misstatement, omission, or mutilation.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19003, Apr. 9, 1993; 64 FR 60993, Nov. 8, 1999]

**§ 240.225 Reliance on qualification determinations made by other railroads.**

(a) After December 31, 1991, a railroad that is considering certification of a person as a qualified engineer may rely on determinations made by another railroad concerning that person's qualifications. The railroad's certification program shall address how the

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railroad will administer the training of previously uncertified engineers with extensive operating experience or previously certified engineers who have had their certification expire. If a railroad's certification program fails to specify how to train a previously certified engineer hired from another railroad, then the railroad shall require the newly hired engineer to take the hiring railroad's entire training program. A railroad relying on another's certification shall determine that:

(1) The prior certification is still valid in accordance with the provisions of §§ 240.201, 240.217, and 240.307;

(2) The prior certification was for the same classification of locomotive or train service as the certification being issued under this section;

(3) The person has received training on and visually observed the physical characteristics of the new territory in accordance with § 240.123;

(4) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 240.125;

(5) The person has demonstrated the necessary performance skills concerning the railroad's operating rules in accordance with § 240.127.

(b) [Reserved]

[64 FR 60993, Nov. 8, 1999]

## § 240.227 Reliance on qualification requirements of other countries.

(a) A railroad that conducts joint operations with a Canadian railroad may certify, for the purposes of compliance with this part, that a person is qualified to be a locomotive or train service engineer provided it determines that:

(1) The person is employed by the Canadian railroad; and

(2) The person meets or exceeds the qualifications standards issued by Transport Canada for such service.

(b) Any Canadian railroad that is required to comply with this regulation may certify that a person is qualified to be a locomotive or train service engineer provided it determines that:

(1) The person is employed by the Canadian railroad; and

(2) The person meets or exceeds the qualifications standards issued by Transport Canada for such service.

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## § 240.229 Requirements for joint operations territory.

(a) Except for minimal joint operations provided for in paragraph (f) of this section, no railroad that is responsible for controlling the conduct of joint operations with another railroad shall permit or require any person to operate a locomotive in any class of train or engine service unless that person has been certified as a qualified locomotive engineer for the purposes of joint operations and issued a certificate that complies with § 240.223.

(b) Each railroad that is responsible for controlling the conduct of joint operations with another railroad shall certify a person as a qualified locomotive engineer for the purposes of joint operations either by making the determinations required under subpart C of this part or by relying on the certification issued by another railroad under this part.

(c) A railroad that controls joint operations may rely on the certification issued by another railroad under the following conditions:

(1) The controlling railroad shall determine:

(i) That the person has been certified as a qualified engineer under the provisions of this part by the railroad which employs that individual;

(ii) That the person certified as a locomotive engineer by the other railroad has demonstrated the necessary knowledge concerning the controlling railroad's operating rules, if the rules are different;

(iii) That the person certified as a locomotive engineer by the other railroad has the necessary operating skills concerning the joint operations territory; and

(iv) That the person certified as a locomotive engineer by the other railroad has the necessary familiarity with the physical characteristics for the joint operations territory; and,

(2) The railroad which employs the individual shall determine that the person called to operate on the controlling railroad is a certified engineer who is qualified to operate on that track segment; and

(3) Each locomotive engineer who is called to operate on another railroad shall:

(i) Be qualified on the segment of track upon which he or she will operate in accordance with the requirements set forth by the controlling railroad; and,

(ii) Immediately notify the railroad upon which he or she is employed if he or she is not qualified to perform that service.

(d) A railroad that controls joint operations and certifies locomotive engineers from a different railroad may comply with the requirements of paragraph (a) of this section by noting its supplemental certification decision on the original certificate as provided for in § 240.223(c).

(e) A railroad responsible for controlling the conduct of joint operations with another railroad shall be deemed to be in compliance with paragraph (a) of this section when it provides a qualified person to accompany a locomotive engineer who lacks joint operations certification during that engineer's operations in joint operations territory. As used in this section qualified person means either a designated supervisor of locomotive engineers or a certified train service engineer determined by the controlling railroad to have the necessary knowledge concerning the controlling railroad's operating rules and to have the necessary operating skills including familiarity with its physical characteristics concerning the joint operations territory.

(f) A railroad that is responsible for controlling the conduct of joint operations with another railroad may permit a certified locomotive engineer to operate a locomotive in any class of train or engine service without determining that the person has been certified as a qualified locomotive engineer for the purposes of joint operations when a minimal joint operation is involved. For the purposes of this section a minimal joint operation exists when a locomotive or train belonging to one railroad is being operated on the same track on which operations are conducted by the railroad controlling operations, under the following conditions:

(1) The maximum authorized speed for operations on the track does not exceed 20 miles per hour;

(2) The track is other than a main track;

(3) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer; and

(4) The maximum distance for joint operations on the track does not exceed one mile.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19003, Apr. 9, 1993; 64 FR 60993, Nov. 8, 1999]

**§ 240.231 Requirements for locomotive engineers unfamiliar with physical characteristics in other than joint operations.**

(a) Except as provided in paragraph (b) of this section, no locomotive engineer shall operate a locomotive over a territory unless he or she is qualified on the physical characteristics of the territory pursuant to the railroad's certification program.

(b) Except as provided in paragraph (c) of this section, if a locomotive engineer lacks qualification on the physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a pilot qualified over the territory pursuant to the railroad's certification program.

(1) For a locomotive engineer who has never been qualified on the physical characteristics of the territory over which he or she is to operate a locomotive or train, the pilot shall be a person qualified and certified as a locomotive engineer who is not an assigned crew member.

(2) For a locomotive engineer who was previously qualified on the physical characteristics of the territory over which he or she is to operate a locomotive or train, but whose qualification has expired, the pilot may be any person, who is not an assigned crew member, qualified on the physical characteristics of the territory.

(c) Pilots are not required if the movement is on a section of track with an average grade of less than 1% over 3 continuous miles, and

(1) The track is other than a main track; or

## § 240.301

(2) The maximum distance the locomotive or train will be operated does not exceed one mile; or

(3) The maximum authorized speed for any operation on the track does not exceed 20 miles per hour; or

(4) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer.

[64 FR 60993, Nov. 8, 1999]

### Subpart D—Administration of the Certification Programs

#### § 240.301 Replacement of certificates.

A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates and that system shall be reasonably accessible to certified locomotive engineers in need of a replacement certificate.

#### § 240.303 Operational monitoring requirements.

(a) After December 31, 1991, each railroad to which this part applies shall, prior to FRA approval of its program in accordance with § 240.201, have a program to monitor the conduct of its certified locomotive engineers by performing both operational monitoring observations and by conducting unannounced operating rules compliance tests.

(b) The program shall be conducted so that each locomotive engineer shall be given at least one operational monitoring observation by a qualified supervisor of locomotive engineers in each calendar year.

(c) The program shall be conducted so that each locomotive engineer shall be given at least one unannounced compliance test each calendar year.

(d) The unannounced test program shall:

(1) Test engineer compliance with one or more provisions of the railroad's operating rules that require response to signals that display less than a "clear" aspect, if the railroad operates with a signal system that must comply with part 236 of this chapter;

(2) Test engineer compliance with one or more provisions of the railroad's

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operating rules, timetable or other mandatory directives that require affirmative response by the locomotive engineer to less favorable conditions than that which existed prior to initiation of the test;

(3) Test engineer compliance with provisions of the railroad's operating rules, timetable or other mandatory directives the violations of which by engineers were cited by the railroad as the cause of train accidents or train incidents in accident reports filed in compliance with part 225 of this chapter for the preceding year;

(4) Be conducted so that the administration of these tests is effectively distributed throughout whatever portion of a 24-hour day that the railroad conducts its operations;

(5) Be conducted so that individual tests are administered without prior notice to the locomotive engineer being tested; and

(6) Be conducted so that the results of the test are recorded on the certificate and entered on the record established under § 240.215 within 30 days of the day the test is administered.

#### § 240.305 Prohibited conduct.

After December 31, 1991,

(a) It shall be unlawful to:

(1) Operate a locomotive or train past a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it; or

(2) Operate a locomotive or train at a speed which exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, only those violations of the conditional clause of restricted speed rules (i.e., the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, shall be considered instances of failure to adhere to this section; or

(3) Operate a locomotive or train without adhering to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232

or when the procedures are required for compliance with the class I, class 1A, class II, or running brake test provisions of 49 CFR part 238;

(4) Fail to comply with any mandatory directive concerning the movement of a locomotive or train by occupying main track or a segment of main track without proper authority or permission;

(5) Fail to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operate or permit to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (See 49 CFR part 218, subpart D, and appendix C to part 218);

(6) Be a Designated Supervisor of Locomotive Engineers, a certified locomotive engineer pilot or an instructor engineer who is monitoring, piloting or instructing a locomotive engineer and fails to take appropriate action to prevent a violation of paragraphs (a)(1) through (a)(5) of this section. Appropriate action does not mean that a supervisor, pilot or instructor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation. A Designated Supervisor of Locomotive Engineers will not be held culpable under this section when this monitoring event is conducted as part of the railroad's operational compliance tests as defined in §§ 217.9 and 240.303 of this chapter.

(b) Each locomotive engineer who has received a certificate required under this part shall:

(1) Have that certificate in his or her possession while on duty as an engineer; and

(2) Display that certificate upon the receipt of a request to do so from

(i) A representative of the Federal Railroad Administration,

(ii) An officer of the issuing railroad, or

(iii) An officer of another railroad when operating a locomotive or train in joint operations territory.

(c) Any locomotive engineer who is notified or called to operate a locomotive or train and such operation would cause the locomotive engineer to exceed certificate limitations, set forth in accordance with subpart B of this

part, shall immediately notify the railroad that he or she is not qualified to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(d) During the duration of any certification interval, a locomotive engineer who has a current certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied recertification by a railroad or has his or her certification revoked by a railroad.

(e) Nothing in this section shall be deemed to alter a certified locomotive engineer's duty to comply with other provisions of this chapter concerning railroad safety.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19004, Apr. 9, 1993; 64 FR 60993, Nov. 8, 1999]

#### § 240.307 Revocation of certification.

(a) Except as provided for in § 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires information which convinces the railroad that the person no longer meets the qualification requirements of this part, shall revoke the person's certificate as a qualified locomotive engineer.

(b) Pending a revocation determination under this section, the railroad shall:

(1) Upon receipt of reliable information indicating the person's lack of qualification under this part, immediately suspend the person's certificate;

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given either orally or in writing. If given orally, it must be confirmed in writing and the written confirmation must be made promptly. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements



of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.

(3) Convene the hearing within the deadline prescribed by either paragraph (c)(1) of this section or the applicable collective bargaining agreement as permitted under paragraph (d) of this section;

(4) Determine, on the record of the hearing, whether the person no longer meets the qualification requirements of this part stating explicitly the basis for the conclusion reached;

(5) When appropriate, impose the pertinent period of revocation provided for in § 240.117 or § 240.119; and

(6) Retain the record of the hearing for 3 years after the date the decision is rendered.

(c) Except as provided for in paragraphs (d), (f), (i) and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be convened within 10 days of the date the certificate is suspended unless the locomotive engineer requests or consents to delay in the start of the hearing.

(2) The hearing shall be conducted by a presiding officer, who can be any qualified person authorized by the railroad other than the investigating officer.

(3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(4) The presiding officer shall convene and preside over the hearing.

(5) Testimony by witnesses at the hearing shall be recorded verbatim.

(6) All relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(7) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing;

(iii) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(iv) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(9) The record in the proceeding shall be closed at conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(10) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record; and

(ii) Be served on the employee.

(12) The railroad shall have the burden of proving that the locomotive engineer's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

(d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances a railroad official, other than the investigating officer, shall make separate findings as to the revocation required under this section.

(f) A person may waive the right to the hearing provided under this section. That waiver shall:

- (1) Be made in writing;
- (2) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and
- (3) Be signed by the person making the waiver.

(g) A railroad that has relied on the certification by another railroad under the provisions of §240.227 or §240.229, shall revoke its certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked its certification after determining, in accordance with the provisions of this section, that the person no longer meets the qualification requirements of this part. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) The period of certificate suspension prior to the commencement of a hearing required under this section shall be credited towards satisfying any applicable revocation period imposed in accordance with the provisions of §240.117.

(i) A railroad:

(1) Shall not determine that the person failed to meet the qualification requirements of this part and shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under §240.117(e)(1) through (e)(5) of this part; or

(2) May determine that the person meets the qualification requirements of this part and decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of §240.117(e)(1) through (e)(5) of this part was of a minimal nature and had no direct or potential effect on rail safety.

(j) The railroad shall place the relevant information in the records maintained in compliance with §240.309 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and §240.15 for Class III railroads if sufficient evidence meeting the criteria provided in paragraph (i) of this section, becomes available either:

(1) Prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section; or

(2) Prior to the convening of the hearing provided for in this section;

(k) Provided that the railroad makes a good faith determination after a reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate, the railroad which does not suspend a locomotive engineer's certification, as provided for in paragraph (a) of this section, is not in violation of paragraph (a) of this section.

[58 FR 19004, Apr. 9, 1993, as amended at 60 FR 53137, Oct. 12, 1995; 64 FR 60994, Nov. 8, 1999]

#### **§ 240.309 Railroad oversight responsibilities.**

(a) No later than March 31 of each year (beginning in calendar year 1993), each Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified locomotive engineers during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported train accidents attributed to poor safety performance by locomotive engineers;

(3) The number and type of operational monitoring test failures and observations of inadequate skill performance recorded by supervisors of locomotive engineers; and

(4) If it conducts joint operations with another railroad, the number of

locomotive engineers employed by such other railroad(s) to which such events were ascribed which the controlling railroad certified for joint operations purposes.

(c) Based on that review and analysis each railroad shall determine what action(s) it will take to improve the safety of train operations to reduce or eliminate future incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving noncompliance with part 218;

(2) Incidents involving noncompliance with part 219;

(3) Incidents involving noncompliance with the procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class I, class 1A, class II, or running brake test provisions of 49 CFR part 238;

(4) Incidents involving noncompliance with the railroad's operating rules involving operation of a locomotive or train to operate at a speed that exceeds the maximum authorized limit;

(5) Incidents involving noncompliance with the railroad's operating rules resulting in operation of a locomotive or train past any signal, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(6) Incidents involving noncompliance with the provisions of restricted speed, and the operational equivalent thereof, that must be reported under the provisions of part 225 of this chapter;

(7) Incidents involving occupying main track or a segment of main track without proper authority or permission;

(8) Incidents involving the failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized or disabled safety device in the controlling locomotive;

(9) Incidents involving noncompliance with the railroad's operating practices (including train handling procedures) resulting in excessive in-train force levels; and

(f) For reporting purposes each category of detected poor safety conduct identified in paragraph (d) of this section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken and the number of events subdivided so as to reflect which of the following actions was selected:

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the hearing officer:

(i) The person was withheld from service;

(ii) The person was dismissed from employment or

(iii) The person was issued demerits. If more than one form of punishment was imposed only that punishment deemed the most severe shall be shown.

(g) For reporting purposes each category of detected poor safety conduct identified in paragraph (d) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment

or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(h) For reporting purposes each category of detected poor safety conduct identified in paragraph (d) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60994, Nov. 8, 1999]

### Subpart E—Dispute Resolution Procedures

#### § 240.401 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the qualification requirements of this regulation when making the decision to deny or revoke certification, may petition the Federal Railroad Administrator to review the railroad's decision.

(b) The Federal Railroad Administrator has delegated initial responsibility for adjudicating such disputes to the Locomotive Engineer Review Board.

(c) The Locomotive Engineer Review Board shall be composed of at least three employees of the Federal Railroad Administration selected by the Administrator.

[56 FR 28254, June 19, 1991, as amended at 58 FR 19005, Apr. 9, 1993]

#### § 240.403 Petition requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW, Washington, DC 20590;

(3) Contain all available information that the person thinks supports the person's belief that the railroad acted improperly, including:

(i) The petitioner's full name;

(ii) The petitioner's current mailing address;

(iii) The petitioner's daytime telephone number;

(iv) The name and address of the railroad; and

(v) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

(4) Explain the nature of the remedial action sought;

(5) Be supplemented by a copy of all written documents in the petitioner's possession that document that railroad's decision; and

(6) Be filed in a timely manner.

(c) A petition seeking review of a railroad's decision to deny certification or recertification filed with FRA more than 180 days after the date of the railroad's denial decision will be denied as untimely.

(d) A petition seeking review of a railroad's decision to revoke certification in accordance with the procedures required by § 240.307 filed with FRA more than 120 days after the date of the railroad's revocation decision will be denied as untimely except that the Locomotive Engineer Review Board for cause shown may extend the petition filing period at any time in its discretion:

(1) Provided the request for extension is filed before the expiration of the period provided in this paragraph (d); or

(2) Provided that the failure to timely file was the result of excusable neglect.

(e) A party aggrieved by a Board decision to deny a petition as untimely

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may file an appeal with the Administrator in accordance with § 240.411.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60995, Nov. 8, 1999; 64 FR 70196, Dec. 16, 1999]

### § 240.405 Processing qualification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed pursuant to paragraph (c) of this section.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and provide the railroad with a copy of the petition.

(c) The railroad will be given a period of not to exceed 60 days to submit to FRA any information that the railroad considers pertinent to the petition. Late filings will only be considered to the extent practicable.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding;

(2) Provide a copy of the information being submitted to FRA to the petitioner.

(3) Submit the information in triplicate to the Docket Clerk, Federal Railroad Administration, 400 Seventh Street SW., Washington, DC 20590;

(e) Each petition will then be referred to the Locomotive Engineer Review Board for a decision.

(f) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.*, based on an incorrect determination that the person failed to meet the qualification requirements of this regulation) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.*, it will not consider whether the railroad properly applied its own more stringent requirements.

(g) Notice of that decision will be provided in writing to both the peti-

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tioner and the railroad. The decision will include findings of fact on which it is based.

[56 FR 28254, June 19, 1991, as amended at 64 FR 60995, Nov. 8, 1999]

### § 240.407 Request for a hearing.

(a) If adversely affected by the Locomotive Engineer Review Board decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 240.409.

(b) To exercise that right, the adversely affected party shall, within 20 days of service of the Board's decision on that party, file a written request with the Docket Clerk, Department of Transportation Central Docket Management System, Nassif Building, Room PL-401, 400 Seventh Street, S.W., Washington, D.C. 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Central Docket Management System and posted on its web site at <http://dms.dot.gov>.

(c) The result of a failure to request a hearing within the period provided in paragraph (b) of this section is that the Locomotive Engineer Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, and telephone number of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(3) The signature of the requesting party or the requesting party's representative, if any.

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

[60 FR 53137, Oct. 12, 1995, as amended at 64 FR 70196, Dec. 16, 1999]

**§ 240.409 Hearings.**

(a) An administrative hearing for a locomotive engineer qualification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator, including an administrative law judge.

(b) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(c) The presiding officer shall convene and preside over the hearing. The hearing shall be a *de novo* hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all

parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 240.407(c) of this part and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made

orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas as provided for in § 209.7 of part 209 in this chapter;
- (3) Adopt any needed procedures for the submission of evidence in written form;
- (4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Locomotive Engineer Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the "hearing petitioner." The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Locomotive Engineer Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. Between the petitioner before the Locomotive Engineer Review Board and the railroad involved in taking the certification action, the party who is not the hearing petitioner will be a respondent.

(r) FRA will be a mandatory party to the administrative hearing. At the start of each proceeding, FRA will be a respondent.

(s) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(t) At the close of the record, the presiding officer shall prepare a written decision in the proceeding.

(u) The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each concerning all material issues of fact or law presented on the record;

(2) Shall be served on the hearing petitioner and all other parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

[60 FR 53137, Oct. 12, 1995]

#### § 240.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 400 Seventh Street SW., Washington, DC 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by

reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) Where a party files an appeal from a Locomotive Engineer Review Board decision pursuant to § 240.403(e), the Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

[56 FR 28254, June 19, 1991, as amended at 60 FR 53138, Oct. 12, 1995; 64 FR 60995, Nov. 8, 1999]

#### APPENDIX A TO PART 240—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
Subpart B—Component Elements		
240.101—Program Failures		
(a) Failure to have program .....	\$5,000	\$10,000
(b) Program that fails to address a subject .....	2,500	5,000
240.103—Failure to:		
(a) follow Appendix B .....	1,000	2,000
(d) to resubmit, when directed by FRA .....	1,000	2,000
240.104—Allowing uncertified person to operate non-traditional locomotives .....	5,000	10,000
240.105—Failure to have or execute adequate procedure for selection of supervisors .....	2,500	5,000
240.107—Classes of Service		
(a) Failure to designate classes of service .....	2,000	4,000
240.109—Limitations on considering prior conduct records		
(a) Failure to have procedure for determining eligibility .....	2,500	5,000
(e) Considering excluded data .....	2,000	4,000
(f,g) Failure to provide timely review opportunity .....	2,000	4,000
240.111—Furnishing Motor Vehicle Records:		
(a) Failure to action required to make information available .....	1,000	2,000
(b) Failure to request:		



Section	Violation	Willful violation
(1) local record .....	1,000	2,000
(2) NDR record .....	1,000	2,000
(f) Failure to request additional record .....	1,000	2,000
(g) Failure to notify of absence of license .....	750	1,500
(h) Failure to submit request in timely manner .....	750	1,500
(i) Failure to report within 48 hours or railroad taking certification action for not reporting earlier than 48 hours .....	1,000	2,000
240.113—Furnishing prior employment information		
(a) Failure to take action required to make information available .....	1,000	2,000
(b) Failure to request record .....	1,000	2,000
240.115—Criteria for considering prior motor vehicle conduct		
(b) Considering excluded data .....	2,000	4,000
(c) Failure to		
(1) consider data .....	5,000	7,500
(3,4) properly act in response to data .....	2,500	5,000
240.117—Consideration of Operational Rules Compliance Records:		
(a) Failure to have program and procedures .....	5,000	10,000
(b–j) Failure to have adequate program or procedure .....	2,500	5,000
240.119—Consideration of substance abuse /rules compliance records		
(a) Failure to have program and procedures .....	5,000	10,000
(b–e) Failure to have adequate program or procedure .....	2,500	5,000
240.121—Failure to have adequate procedure for determining acuity .....	2,500	5,000
(f) Failure of engineer to notify .....	2,500	5,000
240.123—Failure to have:		
(b) Adequate procedures for continuing education .....	2,500	5,000
(c) adequate procedures for training new engineers .....	2,500	5,000
240.125—Failure to have		
(a) adequate procedures for testing knowledge .....	2,500	5,000
(d) adequate procedures for documenting testing .....	2,500	5,000
240.127—Failure to have		
(a) adequate procedures for evaluating skill performance .....	2,500	5,000
(c) adequate procedures for documenting skills testing .....	2,500	5,000
240.129—Failure to have		
(a–b) adequate procedures for monitoring performance .....	2,500	5,000
Subpart C—Implementation of the Process		
240.201—Schedule for implementation		
(a) Failure to select supervisors by specified date .....	1,000	2,000
(b) Failure to identify grandfathered engineers .....	2,000	4,000
(c) Failure to issue certificate to engineer .....	1,000	2,000
(d) Allowing uncertified person to operate .....	5,000	10,000
(e–g) Certifying without complying with subpart C .....	2,500	5,000
(h–i) Failure to issue certificate to engineer .....	1,000	2,000
240.203 (a) Designating a person as a supervisor without determining that		
(1) person knows and understands this part .....	2,500	5,000
(2) person can test and evaluate engineers .....	5,000	7,500
(3) person has experience to prescribe remedies .....	2,500	5,000
(b) Certifying a person without determining that		
(1) person meets the eligibility criteria .....	5,000	7,500
(2) person meets the medical criteria .....	2,500	5,000
(3) person has demonstrated knowledge .....	2,500	5,000
(4) person has demonstrated skills .....	2,500	5,000
(c) Certifying a person without determining that		
(1) person has completed training program .....	2,500	5,000
(2) person meets the eligibility criteria .....	2,500	5,000
(3) time has elapsed .....	2,500	5,000
240.205—Procedures for determining eligibility based on prior safety conduct		
(a) Selecting person lacking eligibility .....	5,000	7,500
(d) Failure to have basis for taking action .....	2,500	5,000
240.207—Ineligibility based on medical condition		
(a) Selecting person lacking proper acuity .....	2,000	4,000
(b) Failure to have basis for finding of proper acuity .....	1,000	2,000
(c) Acuity examinations performed by unauthorized person .....	1,000	2,000
(d) Failure to note need for device to achieve acuity .....	1,000	2,000
(e) Failure to use device needed for proper acuity .....	1,000	2,000
240.209—Demonstrating knowledge		
(b) Failure to properly determine knowledge .....	2,500	5,000
(c) Improper test procedure .....	2,000	4,000
(d) Failure to document test results .....	1,000	2,000
(e) Allowing person to operate despite test failure .....	2,500	5,000
240.211—Demonstrating skills		
(b) Failure to properly determine knowledge .....	2,500	5,000
(c) Improper test procedure .....	2,000	4,000
(d) Failure to document test results .....	1,000	2,000

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Section	Violation	Willful violation
(e) Allowing person to operate despite test failure .....	2,500	5,000
240.213—Completion of approved training program .....		
(a) Failure to properly determine .....	2,500	5,000
(b) Failure to document successful program completion .....	2,000	4,000
240.215—Supporting information .....		
(a, f–h) Failure to have a record .....	1,000	2,000
(b) Failure to have complete record .....	500	1,000
(i) Falsification of record .....	(–)	10,000
240.217—Time limits for making determinations .....		
(a, c) Exceeding time limit .....	2,000	4,000
240.219—Denial of certification .....		
(a) Failure to notify or provide opportunity for comment .....	2,000	4,000
(c) Failure to notify, provide data, or untimely notification .....	2,000	4,000
240.221—Identification of persons .....		
(a–c) Failure to have a record .....	2,000	4,000
(d) Failure to update a record .....	2,000	4,000
(e–f) Failure to make a record available .....	1,000	2,000
240.223—Certificate criteria .....		
(a) Improper certificate .....	500	1,000
(b) Failure to designate those with signatory authority .....	500	1,000
(d) Falsification of certificate .....	(–)	10,000
240.225—Railroad Relying on Determination of Another:		
(a) Failure to address in program or failure to require newly hired engineer to take entire training program .....	5,000	7,500
(1) Reliance on expired certification .....	2,500	5,000
(2) Reliance on wrong class of service .....	2,500	5,000
(3) Failure to familiarize person with new operational territory .....	2,000	4,000
(4) Failure to determine knowledge .....	2,000	4,000
(5) Failure to determine performance skills .....	2,000	4,000
240.227—Railroad Relying on Requirements of a Different Country .....		
(a) Joint operator reliance .....		
(1) on person not employed .....	1,000	2,000
(2) on person who fails to meet Canadian requirements .....	1,000	2,000
(b) Canadian railroad reliance .....		
(1) on person not employed .....	1,000	2,000
(2) on person who fails to meet Canadian requirements .....	1,000	2,000
240.229—Requirements for Joint Operations Territory:		
(a) Allowing uncertified person to operate .....	2,000	4,000
(b) Certifying without making determinations or relying on another railroad .....	2,500	5,000
(c) Failure of:		
(1) controlling railroad certifying without determining certification status, knowledge, skills, or familiarity with physical characteristics .....	4,000	8,000
(2) employing railroad to determine person's certified and qualified status for controlling railroad .....	4,000	8,000
(3) person to notify employing railroad of lack of qualifications .....	4,000	8,000
(d) Failure to provide qualified person .....	2,000	4,000
240.231—Persons Qualified on Physical Characteristics in Other Than Joint Operations:		
(a) Person unqualified, no exception applies or railroad does not adequately address in program .....	5,000	10,000
(b) Failure to have a pilot:		
(1) for engineer who has never been qualified .....	4,000	8,000
(2) for engineer previously qualified .....	2,500	5,000
Subpart D—Program Administration .....		
240.301—Failure to have system for certificate replacement .....	2,000	4,000
240.303—Monitoring operations .....		
(a) Failure to have program .....	5,000	10,000
(b) Failure to observe each person annually .....	1,000	2,000
(c) Failure to test each person annually .....	1,000	2,000
(d) Failure to test properly .....	1,000	2,000
240.305—Prohibited Conduct:		
(a) Unlawful:		
(1) passing of stop signal .....	2,500	5,000
(2) control of speed .....	2,500	5,000
(3) brake tests .....	2,500	5,000
(4) occupancy of main track .....	2,500	5,000
(5) tampering on operation with disabled safety device .....	2,500	5,000
(6) supervisor, pilot, or instructor fails to take appropriate action .....	2,500	5,000
(b) Failure of engineer to:		
(1) carry certificate .....	1,000	2,000
(2) display certificate when requested .....	1,000	2,000
(c) Failure of engineer to notify railroad of limitations or railroad requiring engineer to exceed limitations .....	4,000	8,000
(d) Failure of engineer to notify railroad of denial or revocation .....	4,000	8,000
240.307—Revocation of Certification:		

Section	Violation	Willful violation
(a) Failure to withdraw person from service .....	2,500	5,000
(b) Failure to notify, provide hearing opportunity, or untimely procedures .....	2,500	5,000
(c–h) Failure of railroad to comply with hearing or waiver procedures .....	1,000	2,000
(j) Failure of railroad to make record .....	2,500	5,000
(k) Failure of railroad to conduct reasonable inquiry or make good faith determination .....	5,000	10,000
240.309—Oversight Responsibility Report:		
(a) Failure to report or to report on time .....	1,000	2,000
(b–h) Incomplete or inaccurate report .....	2,000	4,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$22,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

[56 FR 28254, June 19, 1991, as amended at 60 FR 53138, Oct. 12, 1995; 63 FR 11624, Mar. 10, 1998; 64 FR 60995, Nov. 8, 1999]

#### APPENDIX B TO PART 240—PROCEDURES FOR SUBMISSION AND APPROVAL OF LOCOMOTIVE ENGINEER QUALIFICATION PROGRAMS

This appendix establishes procedures for the submission and approval of a railroad's program concerning the training, testing, and evaluating of persons seeking certification or recertification as a locomotive engineer in accordance with the requirements of this part (see §§ 240.101, 240.103, 240.105, 240.107, 240.123, 240.125, 240.127 and 240.129). It also contains guidance on how FRA will exercise its review and approval responsibilities.

##### *Submission by a Railroad*

As provided for in § 240.101, each railroad must have a program for determining the qualifications of each person it permits or requires to operate a locomotive. In designing its program a railroad must take into account the trackage and terrain over which it operates, the system(s) for train control that are employed, the operational design characteristics of the track and equipment being operated including train length, train make-up, and train speeds. Each railroad must submit its individual program to FRA for approval as provided for in § 240.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed. Requests should be submitted in writing on standard sized paper (8-1/2x11) and can be in letter or narrative format. The railroad's submission shall be sent to the Associate Administrator for Safety, FRA. The mailing address for FRA is 400 Seventh Street, SW., Washington, DC 20590.

##### *Organization of the Submission*

Each request should be organized to present the required information in the following standardized manner. Each section must begin by giving the name, title, tele-

phone number, and mailing address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

##### *Section 1 of the Submission: General Information and Elections*

The first section of the request must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and mailing address) and a statement electing either to accept responsibility for educating previously untrained persons to be qualified locomotive engineers or recertify only engineers previously certified by other railroads (see § 240.103(b)).

If a railroad elects not to conduct the training of persons not previously trained to be a locomotive engineer, the railroad is not obligated to submit information on how the previously untrained will be trained. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that initially elects not to accept responsibility for training its own locomotive engineers can rescind its initial election by obtaining FRA approval of a modification of its program (see § 240.103(e)).

If a railroad elects to accept responsibility for conducting the education of persons not previously trained to be locomotive engineers, the railroad is obligated to submit information on how such persons will be trained but has no duty to actually conduct such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for assuring that such other training providers adhere to the training program the railroad submits.

This section must also state which class or classes of service the railroad will employ. (See § 240.107).

*Section 2 of the Submission: Selection of Supervisors of Locomotive Engineers*

The second section of the request must contain information concerning the railroad's procedure for selecting the person or persons it will rely on to evaluate the knowledge, skill, and ability of persons seeking certification or recertification. As provided for in §240.105 each railroad must have a procedure for selecting supervisors of locomotive engineers which assures that persons so designated can appropriately test and evaluate the knowledge, skill, and ability of individuals seeking certification or recertification.

Section 240.105 provides a railroad latitude to select the criteria and evaluation methodology it will rely on to determine which person or persons have the required capacity to perform as a supervisor of locomotive engineers. The railroad must describe in this section how it will use that latitude and evaluate those it designates as supervisors of locomotive engineers so as to comply with the performance standard set forth in §240.105(b). The railroad must identify, in sufficient detail to permit effective review by FRA, the criteria for evaluation it has selected. For example, if a railroad intends to rely on one or more of the following, a minimum level of prior experience as an engineer, successful completion of a course of study, or successful passage of a standardized testing program, the submission must state which criteria it will employ.

*Section 3 of the Submission: Training Persons Previously Certified*

The third section of the request must contain information concerning the railroad's program for training previously certified locomotive engineers. As provided for in §240.123(b) each railroad must have a program for the ongoing education of its locomotive engineers to assure that they maintain the necessary knowledge concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant Federal safety rules.

Section 240.123(b) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its engineers remain knowledgeable concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in §240.123(b). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency

and duration of the training sessions, the training environment employed (for example, and use of classroom, use of computer based training, use of simulators, use of film or slide presentations, use of on-job-training) and which aspects of the program are voluntary or mandatory.

Safe train handling involves both abstract knowledge about the appropriate use of engine controls and the application of that knowledge to trains of differing composition traversing varying terrain. Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, locomotive engineers need to have their fundamental knowledge of train operations refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of particular concern to FRA is how each railroad acts to assure that engineers remain knowledgeable about safe train handling procedures if the territory over which a locomotive engineer is authorized to operate is territory from which the engineer has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory engineers are authorized to operate over.

*Section 4 of the Submission: Testing and Evaluating Persons Previously Certified*

The fourth section of the request must contain information concerning the railroad's program for testing and evaluating previously certified locomotive engineers. As provided for in §240.125 and §240.127, each railroad must have a program for the ongoing testing and evaluating of its locomotive engineers to assure that they have the necessary knowledge and skills concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant

Federal safety rules. Similarly, each railroad must have a program for ongoing testing and evaluating to assure that its locomotive engineers have the necessary vision and hearing acuity as provided for in §240.121.

Sections 240.125 and 240.127 require that a railroad rely on written procedures for determining that each person can demonstrate his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.125 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions and answers and covers the following subject matters: (i) Personal safety practices; (ii) operating practices; (iii) equipment inspection practices; (iv) train handling practices (including familiarity with the physical characteristics of the territory); and (v) compliance with relevant Federal safety rules. The test must accurately measure the person's knowledge of all of these areas.

Section 240.125 provides a railroad latitude in selecting the design of its own testing policies (including the number of questions each test will contain, how each required subject matter will be covered, weighting (if any) to be given to particular subject matter responses, selection of passing scores, and the manner of presenting the test information). The railroad must describe in this section how it will use that latitude to assure that its engineers will demonstrate their knowledge concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in §240.125.

Section 240.127 directs that, when seeking a demonstration of the person's skill, a railroad must employ a test and evaluation procedure conducted by a designated supervisor of locomotive engineers that contains an objective evaluation of the person's skills at applying the railroad's rules and practices for the safe operation of trains. The test and evaluation procedure must examine the person's skills in terms of all of the following subject matters: (i) Operating practices; (ii) equipment inspection practices; (iii) train handling practices (including familiarity with the physical characteristics of the territory); and (iv) compliance with relevant Federal safety rules. The test must be sufficient to effectively examine the person's skills while operating a train in the most demanding type of service which the person is likely to encounter in the normal course of events once he or she is deemed qualified.

Section 240.127 provides a railroad latitude in selecting the design of its own testing and evaluation procedures (including the duration of the evaluation process, how each required subject matter will be covered, weighting (if any) to be given to particular subject

matter response, selection of passing scores, and the manner of presenting the test information). The section should provide information concerning the procedures which the railroad will follow that achieve the objectives described in FRA's recommended practices (see appendix E) for conducting skill performance testing. The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct the test and evaluation procedure. A railroad must describe in this section how it will use that latitude to assure that its engineers will demonstrate their skills concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in §240.127.

Section 240.121 provides a railroad latitude to rely on the professional medical opinion of the railroad's medical examiner concerning the ability of a person with sub-standard acuity to safely operate a locomotive. The railroad must describe in this section how it will assure that its medical examiner has sufficient information concerning the railroad's operations to effectively form appropriate conclusions about the ability of a particular individual to safely operate a train.

*Section 5 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified*

Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be locomotive engineers, the fifth section of the request must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously trained as locomotive engineers. As provided for in §240.123(c), a railroad that is issuing an initial certification to a person to be a locomotive engineer must have a program for the training, testing, and evaluating of its locomotive engineers to assure that they acquire the necessary knowledge and skills concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant Federal safety rules.

Section 240.123 establishes a performance standard and gives a railroad latitude in selecting how it will meet that standard. A railroad must describe in this section how it will use that latitude to assure that its engineers will acquire sufficient knowledge and skill and demonstrate their knowledge and skills concerning the safe discharge of their train operation responsibilities. This section must contain the same level of detail concerning initial training programs as that described for each of the components of the overall program contained in sections 2

through 4 of this appendix. A railroad that plans to accept responsibility for the initial training of locomotive engineers may authorize another railroad or a non-railroad entity to perform the actual training effort. The authorizing railroad may submit a training program developed by that authorized trainer but the authorizing railroad remains responsible for assuring that such other training providers adhere to the training program submitted. Railroads that elect to rely on other entities, to conduct training away from the railroad's own trackage, must indicate how the student will be provided with the required familiarization with the physical characteristics for its trackage.

*Section 6 of the Submission: Monitoring Operational Performance by Certified Engineers*

The final section of the request must contain information concerning the railroad's program for monitoring the operation of its certified locomotive engineers. As provided for in §240.129, each railroad must have a program for the ongoing monitoring of its locomotive engineers to assure that they operate their locomotives in conformity with the railroad's operating rules and practices including methods of safe train handling and relevant Federal safety rules.

Section 240.129 requires that a railroad annually observe each locomotive engineer demonstrating his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.129 directs that the observation be conducted by a designated supervisor of locomotive engineers but provides a railroad latitude in selecting the design of its own observation procedures (including the duration of the observation process, reliance on tapes that record the specifics of train operation, and the specific aspects of the engineer's performance to be covered). The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct monitoring observations. A railroad must describe in this section how it will use that latitude to assure that the railroad is monitoring that its engineers demonstrate their skills concerning the safe discharge of their train operation responsibilities. A railroad that intends to employ train operation event recorder tapes to comply with this monitoring requirement shall indicate in this section how it anticipates determining what person was at the controls and what signal indications or other operational constraints, if any, were applicable to the train's movement.

*Section 7 of the Submission: Procedures for Routine Administration of the Engineer Certification Program*

The final section of the request must contain a summary of how the railroad's program and procedures will implement the various specific aspects of the regulatory provisions that relate to routine administration of its certification program for locomotive engineers. At a minimum this section needs to address the procedural aspects of the rule's provisions identified in the following paragraph.

Section 240.109 provides that each railroad must have procedures for review and comment on adverse prior safety conduct, but allows the railroad to devise its own system within generalized parameters. Sections 240.115, 240.117 and 240.119 require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers, yet leave selection of many details to the railroad. Sections 240.203, 240.217, and 240.219 place a duty on the railroad to make a series of determinations but allow the railroad to select what procedures it will employ to assure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that person is or is not qualified; and how it will communicate adverse decisions. Documentation of the factual basis the railroad relied on in making determinations under §§240.205, 240.207, 240.209, 240.211, and 240.213 is required, but these sections permit the railroad to select the procedures it will employ to accomplish compliance with these provisions. Sections 240.225 and 240.227 permit reliance on qualification determinations made by other entities and permit a railroad latitude in selecting the procedures it will employ to assure compliance with these provisions. Similarly, §240.229 permits use of railroad selected procedures to meet the requirements for certification of engineers performing service in joint operations territory. Sections 240.301 and 240.307 allow a railroad a certain degree of discretion in complying with the requirements for replacing lost certificates or the conduct of certification revocation proceedings.

This section of the request should outline in summary fashion the manner in which the railroad will implement its program so as to comply with the specific aspects of each of the rule's provisions described in preceding paragraph.

*FRA Review*

The submissions made in conformity with this appendix will be deemed approved within 30 days after the required filing date or the actual filing date whichever is later. No

formal approval document will be issued by FRA. The brief interval for review reflects FRA's judgment that railroads generally already have existing programs that will meet the requirements of this part. FRA has taken the responsibility for notifying a railroad when it detects problems with the railroad's program. FRA retains the right to disapprove a program that has obtained approval due to the passage of time as provided for in section §240.103.

FRA initially proposed specifying the details for most aspects of the programs being submitted under this appendix. The proposed rule contained a distillation of the essential elements of pre-existing training, testing, evaluating, and monitoring programs that appear to result in railroads having locomotive engineers who operate locomotives and trains safely. The proposal contained very specific details for each aspect of the program that appeared to contribute to that result. Those details included such things as the duration of classes intended to teach operating rules as well as the interval and methodology for acquiring familiarization with physical characteristics of an engineer's operational territory. Railroads commenting on the proposed rule did not question the validity of the FRA's views concerning the essential elements of an effective program but did convince FRA that they should be given more discretion to formulate the design of their individual programs.

Rather than establish rigid requirements for each element of the program as initially proposed, FRA has given railroads discretion to select the design of their individual programs within a specified context for each element. The proposed rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this final rule. In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms identified in its proposed rule. To the degree that a particular program submission materially deviates from the norms set out in its proposed rule which was published in the FEDERAL REGISTER on December 11, 1989 (54 FR 50890), FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing locomotive engineers who have the knowledge, skill, and ability to safely operate trains.

#### APPENDIX C TO PART 240—PROCEDURES FOR OBTAINING AND EVALUATING MOTOR VEHICLE DRIVING RECORD DATA

The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of section 4(a) of the Railroad Safety Improvement Act of 1988 and §§240.109, 240.111 and 240.205 of this part. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a qualified locomotive engineer.

To fulfill that obligation, a railroad must review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the state agency that issued the candidate's current license. However, it can include multiple records if the candidate has been issued a motor vehicle driving license by more than one state agency. In addition, the railroad must determine whether the certification candidate is listed in the National Driver Register and, if so listed, to review the data that caused the candidate to be so listed.

##### *Access to State Motor Vehicle Driving Record Data*

The right of railroad workers, their employers, or prospective employers to have access to a state motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many states have mechanisms through which employers and prospective employers such as railroads can obtain such data, there are some states in which privacy concerns make such access very difficult or impossible. Since individuals generally are entitled to obtain access to driving record data that will be relied on by a state motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places responsibility on individuals, who want to serve as locomotive engineers to request that their current state drivers licensing agency or agencies furnish such data directly to the railroad considering certifying them as a locomotive operator. Depending on the procedures adopted by a particular state agency, this will involve the candidate's either sending the state agency a brief letter requesting such action or executing a state agency form that accomplishes the same effect. It will normally involve payment of a nominal fee established by the state agency for such a records check. In rare instances, when a certification candidate has been issued multiple

licenses, it may require more than a single request.

#### *The National Driver Register*

In addition to seeking an individual state's data, each engineer candidate is required to request that a search and retrieval be performed of any relevant information concerning his or her driving record contained in the National Driver Register. The National Driver Register (NDR) is a system of information created by Congress in 1960. In essence it is a nationwide repository of information on problem drivers that was created in an effort to protect motorists. It is a voluntary State/Federal cooperative program that assists motor vehicle driver licensing agencies in gaining access to data about actions taken by other state agencies concerning an individual's motor vehicle driving record. The NDR is designed to address the problem that occurs when chronic traffic law violators, after losing their license in one State travel to and receive licenses in another State. Currently the NDR is maintained by the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation under the provisions of the National Driver Register Act (23 U.S.C. 401 note). Under that statute, state motor vehicle licensing authorities voluntarily notify NHTSA when they take action to deny, suspend, revoke or cancel a person's motor vehicle driver's license and, under the provisions of a 1982 change to the statute, states are also authorized to notify NHTSA concerning convictions for operation of a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance, and for traffic violations arising in connection with a fatal traffic accident, reckless driving or racing on the highway even if these convictions do not result in an immediate loss of driving privileges.

The information submitted to NHTSA contains, at a minimum, three specific pieces of data: the identification of the state authority providing the information, the name of the person whose license is being affected, and the date of birth of that person. It may be supplemented by data concerning the person's height, weight, color of eyes, and social security account number, if a State collects such data.

#### *Access to NDR Data*

Essentially only individuals and state licensing agencies can obtain access to the NDR data. Since railroads have no direct access to the NDR data, FRA requires that individuals seeking certification as a locomotive engineer request that an NDR search be performed and direct that the results be furnished to the railroad. FRA requires that each person request the NDR information directly from NHTSA unless the prospective

operator has a motor vehicle driver license issued by a state motor vehicle licensing agency that is "participating" under the provisions of the National Driver Register Act of 1982. Participating states can directly access the NDR data on behalf of the prospective engineer. The state agencies that currently are authorized to access NDR data in that manner are identified in appendix D of this regulation.

#### *Requesting NHTSA to Perform the NDR Check*

The procedures for requesting NHTSA performance of an NDR check are as follows:

1. Each person shall submit a written request to National Highway Traffic Safety Administration at the following address: Chief, National Driver Register, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

2. The request must contain:

- (a) The full legal name;
- (b) Any other names used by the person (e.g., nickname or professional name);
- (c) The date of birth;
- (d) Sex;
- (e) Height;
- (f) Weight;
- (g) Color of eyes;
- (h) Driver's license number (unless that is not available).

3. The request must authorize NHTSA to perform the NDR check and to furnish the results of the search directly to the railroad.

4. The request must identify the railroad to which the results are to be furnished, including the proper name of the railroad, and the proper mailing address of the railroad.

5. The person seeking to become a certified locomotive engineer shall sign the request, and that signature must be notarized.

FRA requires that the request be in writing and contain as much detail as is available to improve the reliability of the data search. Any person may supply additional information to that being mandated by FRA. Furnishing additional information, such as the person's Social Security account number, will help to more positively identify any records that may exist concerning the requester. Although no fee is charged for such NDR checks, a minimal cost may be incurred in having the request notarized. The requirement for notarization is designed to ensure that each person's right to privacy is being respected and that records are only being disclosed to legally authorized parties.

#### *Requesting a State Agency to Perform the NDR Check*

As discussed earlier in connection with obtaining data compiled by the state agency itself, a person can either write a letter to that agency asking for the NDR check or can



use the agency's forms for making such a request. If a request is made by letter the individual must follow the same procedures required when directly seeking the data from NHTSA. At present there are only a limited number of state licensing agencies that have the capacity to make a direct NDR inquiry of this nature. It is anticipated that the number of states with such capability will increase in the near future; therefore, FRA will continue to update the identification of such states by revising appendix D to this regulation to identify such state agencies. Since it would be more efficient for a prospective locomotive engineer to make a single request for both aspects of the information required under this rule, FRA anticipates that state agency inquiry will eventually become the predominant method for making these NDR checks. Requests to state agencies may involve payment of a nominal fee established by the state agency for such a records check.

State agencies normally will respond in approximately 30 days or less and advise whether there is or is not a listing for a person with that name and date of birth. If there is a potential match and the inquiry state was not responsible for causing that entry, the agency normally will indicate in writing the existence of a probable match and will identify the state licensing agency that suspended, revoked or canceled the relevant license or convicted the person of one of the violations referenced earlier in this appendix.

#### *Actions When a Probable NDR Match Occurs*

The response provided after performance of an NDR check is limited to either a notification that no potential record match was identified or a notification that a potential record match was identified. If the latter event occurs, the notification will include the identification of the state motor vehicle licensing authority which possesses the relevant record. If the NDR check results indicate a potential match and that the state with the relevant data is the same state which furnished detailed data (because it had issued the person a driving license), no further action is required to obtain additional data. If the NDR check results indicate a potential match and the state with the relevant data is different from the state which furnished detailed data, it then is necessary to contact the individual state motor vehicle licensing authority that furnished the NDR information to obtain the relevant record. FRA places responsibility on the railroad to notify the engineer candidate and on the candidate to contact the state with the relevant information. FRA requires the certification candidate to write to the state licensing agency and request that the agency inform the railroad concerning the person's

driving record. If required by the state agency, the person may have to pay a nominal fee for providing such data and may have to furnish written evidence that the prospective operator consents to the release of the data to the railroad. FRA does not require that a railroad or a certification candidate go beyond these efforts to obtain the information in the control of such a state agency, and a railroad may act upon the pending certification without the data if an individual state agency fails or refuses to supply the records.

If the non-issuing state licensing agency does provide the railroad with the available records, the railroad must verify that the record pertains to the person being considered for certification. It is necessary to perform this verification because in some instances only limited identification information is furnished for use in the NDR and this might result in data about a different person being supplied to the railroad. Among the available means for verifying that the additional state record pertains to the certification candidate are physical description, photographs and handwriting comparisons.

Once the railroad has obtained the motor vehicle driving record which, depending on the circumstance, may consist of more than two documents, the railroad must afford the prospective engineer an opportunity to review that record and respond in writing to its contents in accordance with the provisions of §240.219. The review opportunity must occur before the railroad evaluates that record. The railroad's required evaluation and subsequent decision making must be done in compliance with the provisions of this part.

#### APPENDIX D TO PART 240—IDENTIFICATION OF STATE AGENCIES THAT PERFORM NATIONAL DRIVER REGISTER CHECKS

Under the provisions of §240.111 of this part, each person seeking certification or recertification as a locomotive operator must request that a check of the National Driver Register (NDR) be conducted and that the resulting information be furnished to his or her employer or prospective employer. Under the provisions of paragraphs (d) and (e) of §240.111, each person seeking certification or recertification as a locomotive engineer must request that National Highway Traffic Safety Administration conduct the NDR check, unless he or she was issued a motor vehicle driver license by one of the state agencies identified in this appendix. If the certification candidate received a license from one of the designated state agencies, he or she must request the state agency to perform the NDR check. The state motor vehicle licensing agencies listed in this appendix participate in a program that authorizes

these state agencies, in accordance with the National Driver Register Act of 1982, to obtain information from the NDR on behalf of individuals seeking data about themselves. Since these state agencies can more efficiently supply the desired data and, in some instances, can provide a higher quality of information, FRA requires that certification candidates make use of this method in preference to directly contacting NHTSA.

Although the number of state agencies that participate in this manner is limited, FRA anticipates that an increasing number of states will do so in the future. This appendix will be revised periodically to reflect current participation in the program. As of December 31, 1989, the motor vehicle licensing agencies of the following states participate under the provisions of the 1982 changes to the NDR Act: North Dakota, Ohio, Virginia, and Washington.

#### APPENDIX E TO PART 240—RECOMMENDED PROCEDURES FOR CONDUCTING SKILL PERFORMANCE TESTS

FRA requires (see §240.127 and §240.211) that locomotive engineers be given a skill performance test prior to certification or recertification and establishes certain criteria for the conduct of that test. Railroads are given discretion concerning the manner in which to administer the required testing. FRA has afforded railroads this discretion to allow individual railroad companies latitude to tailor their testing procedures to the specific operational realities. This appendix contains FRA's recommendations for the administration of skill performance testing that occurs during operation of an actual train. It can be modified to serve in instances where a locomotive simulator is employed for testing purposes. These recommended practices, if followed, will ensure a more thorough and systematic assessment of locomotive engineer performance.

##### *The Need for a Systematic Approach*

There are numerous criteria that should be monitored when a designated supervisor of locomotive engineers is observing a person to determine whether that individual should be certified or recertified as a qualified locomotive engineer. The details of those criteria will vary for the different classes of service, types of railroads, and terrain over which trains are being operated. At a minimum, the attention of a designated supervisor of locomotive engineers should concentrate on several general areas during any appraisal. Compliance with the railroad's operating rules, including its safety directives and train handling rules, and compliance with Federal regulations should be carefully monitored. But, in order to effectively evaluate employees, it is necessary to have some-

thing against which to compare their performance. In order to hold a locomotive engineer accountable for compliance, a railroad must have adequate operating, safety and train handling rules. Any railroad that fails to have adequate operating, safety, or train handling rules will experience difficulty in establishing a objective method of measuring an individual's skill level. Any railroad that requires the evaluation of an individual's performance relative to its train handling rules needs to have established preferred operating ranges for throttle use, brake application, and train speed. The absence of such criteria results in the lack of a meaningful yardstick for the designated supervisor of locomotive engineers to use in measuring the performance of locomotive engineers. It also is essential to have a definite standard so that the engineer and any reviewing body can know what the certification candidate is being measured against.

Evaluating the performance of certain train operation skills will tend to occur in all situations. For example, it would be rare for a designated supervisor of locomotive engineers to observe any operator for a reasonable period of time and not have some opportunity to review that engineer's compliance with some basic safety rules, compliance with basic operating rules, and performance of a brake test. As the complexity of the operation increases, so does the number of items that the operator must comply with. Higher speeds, mountainous terrain, and various signal systems place increased emphasis on the need for operator compliance with more safety, operating, and train handling rules. Accounting for such variables in any universal monitoring scheme immediately results in a fairly complex system.

FRA therefore recommends that designated supervisors of locomotive engineers employ a written aid to help record events and procedures that as a minimum should be observed for when conducting a skills performance test. FRA is providing the following information to assist railroads in developing such a written aid so as to ensure meaningful testing. When conducting a skills performance test, a designated supervisor of locomotive engineers should be alert to the following:

- Does the employee have the necessary books (Operating Rules, Safety Rules, Timetable, etc.)?
- Are predeparture inspections properly conducted (Radio, Air Brake Tests, Locomotive, etc.)?
- Does the employee comply with applicable safety rules?
- Does the employee read the bulletins, general orders, etc.?
- Enroute, does the employee:
- Comply with applicable Federal Rules?
- Monitor gauges?

- Properly use the horn, whistle, headlight?
- Couple to cars at a safe speed?
- Properly control in train slack and buff forces?
- Properly use the train braking systems?
- Comply with speed restrictions?
- Display familiarity with the physical characteristics?
- Comply with signal indications?
- Respond properly to unusual conditions?
- At the conclusion of the trip, does the employee:
- Apply a hand brake to the locomotives?
- Properly report locomotive defects?

Obviously, the less sophisticated the railroad's operations are, the fewer the number of identified practices that would be relevant. Hence, this list should be modified accordingly.

*The Need for Objectivity, Use of Observation Form*

It is essential that railroads conduct the performance skills testing in the most objective manner possible, whether this testing is the locomotive engineer's initial qualification testing or periodic retesting. There will always be some potential for the subjective views, held by the designated supervisor of locomotive engineers conducting the testing, to enter into evaluations concerning the competency of a particular individual to handle the position of locomotive engineer. Steps can be taken, and need to be taken, to minimize the risk that personality factors adversely influence the testing procedure.

One way to reduce the entry of subjective matters into the qualification procedures is through the use of a document that specifies those criteria that the designated supervisor of locomotive engineers is to place emphasis on. The use of an observation form will reduce but not eliminate subjectivity. Any skill performance test will contain some amount of subjectivity. While compliance with the operating rules or the safety rules is clear in most cases, with few opportunities for deviation, train handling offers many options with few absolute right answers. The fact that an engineer applies the train air brakes at one location rather than a few yards away does not necessarily indicate a failure but a question of judgment. The use of dynamic braking versus air brakes at a particular location may be a question of judgment unless the carrier has previously specified the use of a preferred braking method. In any case the engineer's judgment, to apply or not apply a braking sys-

tem at a given location, is subject to the opinion of the designated supervisor of locomotive engineers.

A railroad should attempt to reduce or eliminate such subjectivity through use of some type of observation or evaluation. For railroads developing any evaluation form, the areas of concern identified earlier will not be relevant in all instances. Railroads that do not have sophisticated operations would only need a short list of subjects. For example, most smaller railroads would not require line items pertaining to compliance with signal rule compliance or the use of dynamic brakes. Conversely, in all instances the observation forms should include the time and location that the observer started and ended the observation. FRA believes that there should be a minimum duration for all performance skills examinations. FRA allows railroads to select a duration appropriate for their individual circumstances, requiring only that the period be "of sufficient length to effectively evaluate the person." In exercising its discretion FRA suggests that the minimums selected by a railroad be stated in terms of a distance since the examination has to be of a sufficient duration to adequately monitor the operator's skills in a variety of situations. FRA also suggests that the format for the observation form include a space for recording the observer's comments. Provision for comments ideally would allow for the inclusion of "constructive criticism" without altering the import of the evaluation and would permit subjective comments where merited.

APPENDIX F TO PART 240—MEDICAL STANDARDS GUIDELINES

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 240.121 and 240.207.

(2) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

Accepted tests	Failure criteria
<b>PSEUDOISCHROMATIC PLATE TESTS</b>	
American Optical Company 1965 .....	5 or more errors on plates 1–15.

Accepted tests	Failure criteria
AOC—Hardy-Rand-Ritter plates—second edition .....	Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book)
Dvorine—Second edition .....	3 or more errors on plates 1–15
Ishihara (14 plate) .....	2 or more errors on plates 1–11.
Ishihara (16 plate) .....	2 or more errors on plates 1–8.
Ishihara (24 plate) .....	3 or more errors on plates 1–15.
Ishihara (38 plate) .....	4 or more errors on plates 1–21.
Richmond Plates 1983 .....	5 or more errors on plates 1–15.
<b>MULTIFUNCTION VISION TESTER</b>	
Keystone Orthoscope .....	Any error.
OPTEC 2000 .....	Any error.
Titmus Vision Tester .....	Any error.
Titmus II Vision Tester .....	Any error.

(3) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that “yellow signals” do not always appear to be the same. It is not acceptable to use “yarn” or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person’s color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and §240.121(c)(3).

(4) An examinee who fails to meet the criteria in the chart, may be further evaluated as determined by the railroad’s medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad’s medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria from operating the train at night, during adverse weather conditions or under other circumstances. The intent of §240.121(e) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely operate a locomotive or train. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee’s medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(5) Engineers who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

[64 FR 60996, Nov. 8, 1999]

## PART 241—UNITED STATES LOCAL REQUIREMENT FOR DISPATCHING OF UNITED STATES RAIL OPERATIONS

Sec.

241.1 Purpose and scope.

241.3 Application and responsibility for compliance.

241.5 Definitions.

241.7 Waivers.

241.9 Prohibition against extraterritorial dispatching; exceptions.

241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

241.13 Prohibition against track owner’s requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

241.15 Penalties and other consequences for noncompliance.

241.17 Preemptive effect.

241.19 Information collection.

APPENDIX A TO PART 241—LIST OF LINES BEING EXTRATERRITORIALLY DISPATCHED IN ACCORDANCE WITH THE REGULATIONS CONTAINED IN 49 CFR PART 241, REVISED AS OF OCTOBER 1, 2002

APPENDIX B TO PART 241—SCHEDULE OF CIVIL PENALTIES

APPENDIX C TO PART 241—GEOGRAPHICAL BOUNDARIES OF FRA’S REGIONS AND ADDRESSES OF FRA’S REGIONAL HEAD-QUARTERS

AUTHORITY: 49 U.S.C. 20103, 20107, 21301, 21304, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49.

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